THE

PRACTICE OF THE LAW

IN

ALL ITS DEPARTMENTS;

WITH A VIEW OF

RIGHTS, INJURIES, AND REMEDIES,

AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;

SHOWING

THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;

AND

THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES, AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES; OR TO ENFORCE SPECIFIC RELIEF, PERFORMANCE, OR COMPENSATION.

AND

THE PRACTICE

IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW; EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY; AND COURTS OF APPEAL.

WITH NEW PRACTICAL FORMS.

INTENDED AS

A COURT AND CIRCUIT COMPANION.

IN TWO VOLUMES.

VOL. II.—PART I.

BY J. CHITTY, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER.

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TO

THE THIRD PART.

It has been my intention, in the arrangement of this work, to observe *the natural order* of the subjects as they practically arise in the course of professional business. Therefore, in the preceding parts, we first considered the Private Rights of Persons and of Personal and Real Property, and their Injuries and Remedies in general; then the precautionary measures to improve or enlarge those rights, and to prevent or remove injuries;—next, the measures of redress by Private Individuals themselves, or their relations or friends; then the extent of summary relief by the assistance of Magistrates and other legal Functionaries; then the more formal preventions of Injuries by summary application to Justices or to Courts of Common Law, to obtain *sureties of the Peace*, or *Habeas Corpus*, or to a Court of Equity, to obtain an *Injunction;* and lastly, the modes of enforcing *specific performance* of a contract or duty, either by *Mandamus* or by Suit in the *Spiritual Court*, for Restoration of Conjugal Rights, or by *Bill in Equity*, and decree for a *Specific Performance.* These, together with the operation of the Statutes of Limitation, have all been considered in the preceding parts, constituting the *first Volume.*

In the same natural order of events, we are now to suppose that some description of *Litigation* to obtain compensation or punishment for an injury already

completed, has become inevitable, and must immediately be resorted to on the one hand, or on the other, defended. Here the first consideration will be the necessity for *retaining a Legal Agent,* and the circumstances which should influence the choice; we are, therefore, naturally led, in the *First Chapter* of this Part, to consider the qualifications and professional duties principally of *Attorneys, Solicitors, Proctors, Notaries, Special Pleaders,* and *Barristers:* and we have attempted to collect and arrange some rules for their education and conduct, the observance of which will unquestionably negative any supposition that they can act otherwise than becomes a Profession which ought to be as *honorable* as it is *influential.* I confess, that when I first approached this part of the subject, and recollected that I had met with some instances where the semblance of interest having been placed in one scale, and honor in the other, the latter had kicked the beam, a passing doubt arose whether I might not be assuming to prescribe rules too strict for the present state of Society; but, as I proceeded, and passed in review, the majority of honorable characters well known to me, I have the gratification of declaring that their practice accords with those rules; and I can, without hesitation assert, that every Student in the Law should observe and act up to them. And, considering how much the well being of Society depends on the honorable practice of this very numerous and influential body of men, I apprehend the examination and practical application of all these rules will be found to be of the utmost importance.

In the *Second Chapter* are collected all those rules, the non-observance of which too frequently occasions disastrous defeat at advanced stages of litigation, *viz.*, the necessity for, and modes of ascertaining who

ought to be the *plaintiff* or complainant, and who the *defendant*; also the precise nature of the cause of complaint, essential to be known in order to apply the best remedy, and the evidence of these, and how that is to be obtained or secured; and of Bills of Discovery in general, and the costs thereof. Then the just contrivances to obtain a legal security in lieu of one defective. The expediency of a formal letter or demand from the attorney before the commencement of any proceeding; offers of apology or compromise, or of further security, and how those offers are to be treated; and, in short, the consideration of all those circumstances, the careful attention to which constitute the difference between a really skilful and efficient lawyer, and one who barely knows the ordinary routine of practice. Then are considered certain formal steps, as notices, tenders, and demands in general; demands of the perusal and copy of a Justice's warrant, notices of action to Justices of the Peace and other public officers, and notices of an attorney's or solicitor's lien; then is given an enumeration or outline of the several remedies by legal proceedings for injuries, and concise directions for the choice of the best, and the expediency of retaining a Counsel who is supposed to be most effective and influential, at the place of trial.

The *Third Chapter* relates to a subject of the very greatest practical importance, viz. *Arbitrations*. The slovenly and careless manner in which these have been too frequently conducted, is disgraceful to an intelligent Profession, and the consequent accumulation of expense is equally ruinous to the parties. I have therefore given this subject particular consideration, in the hope that the arrangement and suggestions may tend to an amelioration of the practice. The very

important provisions of the recent act, 3 & 4 W. 4. c. 42, rendering the jurisdiction of Arbitrators more efficient, are practically applied; and new forms to be observed have been suggested in the notes.

In the *Fourth Chapter* I have considered it of essential importance, not only to *Justices of the Peace*, but to *Attornies* and *Private Individuals*, especially country gentlemen, to give an entirely new view of the proper mode of conducting *Summary Proceedings*, as well antecedent as subsequent to *conviction*. The recent enactments, it will be found, have introduced considerable alterations and improvements, and the jurisdiction is of very extensive application; but as yet there is no treatise shewing the practical operation of the four recent acts which afford summary redress for almost every description of *small private or public injuries*, viz. the 9 Geo. 4. c. 31, relating to common assaults and batteries, and which enable *two* Justices to convict in a penalty of 5*l*.,—the 7 & 8 Geo. 4. c. 29, relative to small injuries to personal or real property, in the nature of stealing, though not amounting to *larceny*, and which enables *one* Justice to convict in a penalty of 5*l*.,—the 7 & 8 Geo. 4. c. 30, enabling *one* Justice to convict in a penalty of 5*l*. for any *wilful or malicious injury* to private or public personal or real property,—and the 1 & 2 W. 4. c. 32, enabling *one* Justice to convict in a penalty of 2*l*. for any *trespass* in pursuit of *Game*. These acts, it will be found, are throughout the country of great practical utility, and remove the necessity for trifling actions and prosecutions for comparatively small injuries.

But these constitute a subordinate part of this Chapter, which contains the *whole practical mode* of conducting a *summary proceeding*, from the *information* to the *conviction*, and also the proceedings upon *appeal*

Mr. CHITTY'S WORKS,

PREPARING FOR PUBLICATION.

The Fourth Part (completing the Second Volume of this Work) is in a state of forwardness, and will be published shortly after the promulgation of the New Rules, which, it is expected, will ere long affect Practical Proceedings, as well in Courts of Law as of Equity, and the Ecclesiastical Courts.

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against the same, and the removal thereof by ...
into the Court of King's Bench. In the notes, n.
forms are introduced, to assist Magistrates in their
practical proceedings.

This Chapter concludes with the summary proceedings in cases of *Forcible Entries and Detainers*, and cases between *Landlord and Tenant*, as where the latter, owing half a year's rent, has *deserted* the premises, or has been guilty of a *Fraudulent Removal*, or retains possession of *Parish Property*; and the wholesome proceedings before Justices, where a tenant has been oppressed by exorbitant charges of distress. It is hoped that the perusal of this last Chapter, collecting and arranging all the recent enactments and decisions, may assist and render more secure Justices of the Peace in the performance of their very important and arduous duties.

To facilitate access to every part of this Work, the following *Table of Contents*, referring to each distinct subject, is given, and at the end there is a *full Index.*

J. C.

Chambers, 6, *Chancery Lane*,
Dec. 20*th*, 1833.

TABLE OF CONTENTS

OF

VOL. II. PART I.

CHAPTER I.

OF RETAINING A LEGAL AGENT.—OF ATTORNIES, SOLICITORS, PROCTORS, CERTIFICATED CONVEYANCERS AND NOTARIES, AND OF SPECIAL PLEADERS AND BARRISTERS .... Pages 1 to 45

	Page
I. REASON why a regularly admitted Lawyer must be retained	1 to 4
II. Of Attornies and Solicitors,	1 to 34
Qualifications of	1 to 15
Twenty-two points to be observed	4
Articles of Clerkship......	5
Suggested improvements in...	6 to 9
Points to be observed before execution of..................	10
Service under Articles, and Affidavit of same.........	6 to 12
Examination before Admission	12
Education and Study recommended ......:......... ...	13
When want of Qualification will prejudice Client.........	15
Rules in selecting an Attorney, &c.	16
Purchaser not to employ Vendor's Attorney	17
When an Attorney should not afterwards act against Client	18
Written Retainer advisable ...	*ib.*
Express Stipulation for due Care, when advisable	20
Attorney or Solicitor not to disclose Client's Communications........................	*ib.*
Forms of Retainers	*ib.*
Duty of Attorney, Solicitor, or Proctor, to ascertain Facts, Evidence and Law, before proceeding	21
Duty in preparing a Case and obtaining Opinion	22
Duty of principal Attorney or Solicitor himself to conduct proceeding, and not to delegate to a Clerk......	23
II. Of Attornies and Solicitors (*continued*).	
Conduct with respect to Negociations	24
Other Duties	*ib.*
Impropriety of increasing Expenses	25
Duty to expedite............	*ib.*
Stipulations for Remuneration out of the usual course illegal...........	26
Construction of 2 G. 2. c. 23, s. 23., as to the necessity of delivering Bill	28
What Charges not within the Act	29
When illiberal to tax	30
When the Delivery of a Bill is unnecessary, and how Client then to proceed	*ib.*
Liabilities of Attornies, &c.	32
III. Of PROCTORS	34
IV. Of CERTIFICATED CONVEYANCERS	34
V. Of NOTARIES	36
VI. Of STUDENTS for the BAR, SPECIAL PLEADERS, CONVEYANCERS, and BARRISTERS...	37
Of each becoming a Member of an Inn of Court	39
Their Studies and Attainments, as well in law as otherwise	41
Some of the functions of Special Pleaders and Barristers	42
In giving Opinions	43
In framing Pleadings	44

CHAPTER II.

PROCEEDINGS BETWEEN THE RETAINER AND THE COMMENCEMENT OF LITIGATION ... 46 to 72

	Page
I. Who to be considered injured, and who to sue... ...	47
II. Who the Wrong Doer, liable to be sued, and Mode of Discovery	48
III. What the Cause of Action, and Mode of Discovery ...	52
IV. What the Evidence, and Mode of Discovery...	53
V. Bills for Discovery, and Costs .	54
VI. Of obtaining a more perfect Security...	55
VII. Letter before Action, &c.	56
His written Demand of Interest under 3 & 4 W. 4. c. 42, s. 28	57
VIII. Apologies and Compromises .	*ib.*
IX. Giving Time, and on what Security...	59
X. Notices, Tenders, and Demands	60
XI. Demand of Perusal and Copy of Justice's Warrant	61
Form thereof ...	62
XII. Notices of Action ...	63
Notices to Justices in particular	*ib.*
Decisions on Statutes ...	64
Who a Justice... ...	*ib.*
The intended Writ, how described... ...	65
What Facts and Damage must be stated ...	*ib.*
Recommended Form of Notice	66
Legal Objections unnecessary to be stated	67
Form of Action need not be stated ...	*ib.*
To whom Notice addressed, and how served	*ib.*
Indorsement...	68
Other peculiar Protections in different Statutes...	*ib.*
When the Month expires...	69
General Precautions in case of Local Acts ...	*ib.*
XIII. Attorney's Notice of his Lien	*ib.*
XIV. How to select one of several Remedies.. ...	70
XV. Expediency of retaining particular Counsel...	71

CHAPTER III.

OF REFERENCES TO ARBITRATION, AND PROCEEDINGS THEREON, 73 to 126

	Page
I. Preliminary Observations.	
When or not a reference expedient ...	73
When proper...	75
When not ...	*ib.*
Not when Defence is *stricti juris*, unless under qualified terms ...	76
II. Who may refer	77
When by Executors, Assignees, &c. ...	*ib.*
III. Utility of Reference, to state Facts for Opinion of Court	78
IV. Distinctions between References at Common Law and under Statutes	79
Effect of Arbitration under 9 & 10 W. 3. and 3 & 4 W. 4, c. 42. s. 39, 40, 41	80
Statement of 9 & 10 W. 3. c. 15	*ib.*
Statement of 3 & 4 W. 4. c. 42. s. 39, 40, 41 ...	82

Page

II. PRACTICAL PROCEEDINGS, &c. (*continued*)

Twenty-secondly, Of Writs of Certiorari (*continued*).

Execution to enforce a Conviction after it has been affirmed 226

Liability of Accuser 227

Liabilities of Justice 228

Protection to Justices ... 230

OTHER SUMMARY PROCEEDINGS . 231

Twenty-thirdly, IN CASES OF FORCIBLE ENTRY AND DETAINER .... *ib.*

Prevention of Waste pending Legal Proceedings ... 233

Jurisdiction of Justices in cases of Forcible Entry and Detainer .... *ib.*

Forcible Entries and Forcible Detainers after such Entries 234

Proceedings in case there is no Continuance of the Force in view of the Justice 235

Forcible Detainers 236

Practical Proceedings in case of Forcible Entry and Detainer 240

Certiorari to remove Conviction 241

Twenty-fourthly, IN OTHER CASES, AS BETWEEN LANDLORD AND TENANTS .... *ib.*

1. Premises deserted, and Half a Year's Rent in arrear, and no sufficient Distress, on 11 G. 2. c. 19, s. 16, 17, and 57 G. 3. c. 52 241

Practical Proceedings on same 243

2. Fraudulent Removal, and Justice's Assistance, 11 G. 2. c. 19, s. 4, 5, 6, 7 245

Oath and Warrant to authorise the breaking a Dwelling-house to seize Goods fraudulently removed there to prevent a Distress for Rent, under 11 G. 2. c. 19. s. 7 248

3. Summary Remedy by Justices, where *Paupers*, occupying as such, retain Possession after Permission withdrawn, under 59 G. 3. c. 12, s. 24, 25 249

4. Justice's Assistance, in case of *exorbitant Charges* upon a Distress for Arrear of Rent not exceeding 20*l.*, 57 G. 3. c. 93 ... 250

Summary Proceedings before Justices, under the Laws relating to Customs and Excise 251

Conclusion .... *ib.*

CONTENTS.

	Page
V. Who to be arbitrator...........	83
Precautionary Provisions for a substituted Arbitrator .	84
How to act if Arbitrator refuse........................	ib.
VI. The Practice and Law of Arbitration	85 to 125
First, Terms of Submission...	85
Should stipulate for Submission being made a Rule of Court	86
By an Agent, how framed	ib.
By Executors, Assignees, &c.	87
Power of Arbitrator limited	ib.
Other suggested Terms .	88
Forms of Agreements of Reference.........	88 to 93
1. By Agreement not under Seal	88
2. By Cross Bonds....	ib.
3. By Indenture	ib.
4. Form of Recital of Matters in Difference	ib.
5. Stipulation to abide by Award...........	ib.
6. General Power to Enlarge	ib.
7. Submission to be made a Rule of Court	89
8. Parties and Witnesses to be examined on Oath	ib.
9. Costs of Action to abide the Event	ib.
10. All other Costs in discretion of the Arbitrator	ib.
11. Proviso that an Award signed by Two or Three Arbitrators to suffice	ib.
12. Power to appoint fresh Arbitrators or Umpire, and for the latter to award without a further Meeting	ib.
13. Extensive Power to Enlarge	ib.
14. Power to regulate or fix the Terms on which a Nuisance may be continued...	ib.
VI. The Practice and Law of Arbitration (*continued*).	Pa
Forms of Agreements of Reference (*continued*).	
15. Order of Reference of an Indictment for Nuisance	90
16. Stipulation against Revocation by Death, Marriage, Bankruptcy, &c.	ib.
17. Stipulation that the Death of the Arbitrator shall not revoke, &c.	ib.
18. Power to examine Parties and Witnesses on Oath	ib.
19. Stipulation to state a candid and explicit account of Claims, and produce Documents	ib.
20. Stipulation that the Arbitrator shall expressly upon the face of his Award adjudicate separately upon each Claim	ib.
21. Stipulation that the Arbitrator shall if required state the Evidence and Points of Law on the face of his Award	90
22. Power to award Costs of Delay	91
23. Power to proceed *ex parte* in case of absence, or not bringing forward Evidence	ib.
24. Power to proceed *ex parte* in a fuller form	ib.
25. Agreement to prevent an Executor from being liable without Assets	ib.
26. Power to award the Entry of a Judgment to secure Payment..................	ib.
27. Stipulated Damages to be paid, in case of	

Page
Practice and Law of Arbitration (*continued*).
Forms of Agreements of Reference (*continued*).
unreasonable Delay by either Party... .. 92
When no Amendment of Terms allowed 89, 90
Secondly, The *Affidavit* of Execution of Agreement ... 91
Form thereof ...... 92, note (*q*)
Thirdly, Making Submission Rule of Court 92
Fourthly, Appointment of Umpire 93
Form of Arbitrator's Appointment of an Umpire 93, 94
Fifthly, The Meetings and securing the Attendance of Witnesses 94
Necessity for written Appointments of Meetings 94
Form thereof ...... 94, in n.
Form of Peremptory and Final .... *ib.*
Hearing and Production of Evidence at the first Meeting 94
Meetings to be absolutely effectual 95
Notices of the appointed Meetings .... *ib.*
Sixthly, Enlargement of Time 96
Form of same 97
Seventhly, Proceedings before Arbitrator . ... *ib.*
Form of Arbitrator's enlarging the Time for making his Award .... 97, in n.
Eighthly, Enforcing Attendance of Witnesses, and Production of Documents, under 3 & 4 W. 4. c. 42, s. 40, and swearing Witnesses before Arbitrator . 98
Form of Affidavit to obtain such Judge's Order or Rule 99
Form of Judge's Order thereon .... *ib.*
Ninthly, Of the Arbitrator's swearing the Witnesses . 100
Form of Oath of 101

Page
VI. The Practice and Law of Arbitration (*continued*).
Tenthly, Examination of Witnesses, and Evidence of the Parties 101
Eleventhly, Mode of taking the Evidence 102
Twelfthly, Of Revocations of Arbitrator's Power .... *ib.*
In general .... *ib.*
By Marriage... 103
By Death .... *ib.*
Bankruptcy, its effects 104
Thirteenthly, Of the Award or Certificate 105
Must conform to Authority *ib.*
Must decide upon all sustainable Claims referred . 106
To do an impossible or illegal Act, when valid 107
Must be final, and when deemed so .... *ib.*
When not certain, or final, or defective, because it does not order Payment . 108
A legal Arbitrator may decide contrary to strict rules of Evidence or Law *ib.*
As to awarding Costs 109
Forms of Awards 111
1. Common Form of Award, upon a reference of a Cause and all Matters in Difference .... *ib.*
Recital of Order of Nisi Prius .... *ib.*
Enlargement of Time . *ib.*
Hearing of Parties and Evidence .... *ib.*
Of mutual Releases ... 114
The Adjudication 111
2. Award, subject to Facts for opinion of Court, with Report of Decision of Court thereon 112
3. Award, finding Facts and Adjudication for opinion of Court, resembling in form a Special Verdict ... 113
When Award may be good in part, and void as to residue 114

Page
VI. The Practice and Law of Arbitration (*continued*).
Award, when published...... 115
No Amendment of an Award ib.
Fourteenthly, Of a Certificate in lieu of an Award 112 to 114
Form thereof .... 114, in n.
Fifteenthly, Of setting aside Awards.................... 116
Upon what grounds — on Motion .... *ib.*
When not 119
Exceptions in Practice 120
When Court will or will not set aside the Award on face thereof .... *ib.*
Not after a Party objecting has adopted Award .. ... *ib.*
Time within which to move to set aside 121

Page
VI. The Practice and Law of Arbitration (*continued*).
Practical Proceedings to set aside Awards 121
Submission must be made a Rule of Court .... *ib.*
Rule Nisi, when must state the Objections 122
Sixteenthly, Proceedings to enforce Performance of an Award .... *ib.*
1. By Attachment .... *ib.*
How opposed 123
2. By Action .... *ib.*
Seventeenthly, Jurisdiction in Equity 124
Eighteenthly, Of Arbitrations under other particular Statutes 125

CHAPTER IV.

SUMMARY PROCEEDINGS BEFORE JUSTICES OF THE PEACE FOR PRIVATE INJURIES, AND PENALTIES, AND PRACTICAL DIRECTIONS ...... 127 to 251

I. THOSE OF A GENERAL NATURE.
Preliminary Considerations.
Summary of Proceedings for Private Injuries, and Penalties 127
When these are or not expedient .... *ib.*
Original limited Jurisdiction of Justices of the Peace out of Sessions 128
Jurisdiction extended to cases of Contract 129
Extended to small private Injuries to Persons and Property .... *ib.*
Objects of the recent Enactments .... *ib.*
Rules of Construction as regards Summary Proceedings 130
Precautions in adopting Summary Proceedings............ 131
The four recent Acts separately considered .... 132 to 146
First, Cases of common Assault or Battery, under 9 G. 4. c. 31. s. 27.................. 132, 143
Prescribed *Form of Conviction*, on 9 G. 4. c. 91 134
Secondly, Cases of stealing of Personal or Real Property of small value, as Trees, Fences, &c. not Felony nor Misdemeanor, on 7 & 8 G. 4. c. 29 135
Prescribed *Form of Conviction*, on 7 & 8 G. 4. c. 29 . 138
Thirdly, Cases of small wilful or malicious Injuries to Personal or Real Property, on 7 & 8 G. 4. c. 30, s. 24 ... 139
Prescribed *Form of Conviction*, on 7 & 8 G. 4. c. 30 . 142

..Practi...

...age

I. ...ose of a General Nature (*continued*).

Fourthly, Cases of Trespass against the Game Act, 1 & 2 W. 4. c. 32 142
Prescribed *Form of Conviction* on same 143
Construction and Operation of these Acts .... *ib.*
Construction of Common Assault and Battery Act, 9 G. 4. c. 31 ... . *ib.*
Construction of Petty Stealing Act, 7 & 8 G. 4. c. 29 144
Construction of Malicious Injury Act, 7 & 8 G. 4. c. 30. *ib.*
Construction of Game Act, 1 & 2 W. 4. c. 32 146
Similarity in most Statutes of this nature .... *ib.*

II. Practical Proceedings to enforce Compensation for Penalties in General 147

First, within what *Time* must prosecute .... *ib.*
Month, how construed ...... *ib.*
When first Day excluded .. 148
Secondly, Who to prosecute...... 149
Summary Proceedings on Justice's own view 151
Thirdly, Against whom............ *ib.*
Fourthly, Before what Justice or Justices 152
One Justice may issue Summons, even when two Justices must convict ... 154
Justices not to be interested *ib.*
Fifthly, Of the Information or Complaint 155
Form and Strictness required in general ...... *ib.*
Statement of the usual Form of Information 156
Form of Information to be used in most cases 156, n. (*h*)
What Defects in Information aided 158, 170
Information, when sustain-

Page

II. Practical Proceedings to enforce Compensation for Penalties in General (*continued*).

Fifthly, Of the Information or Complaint (*continued*).
able in part, though bad as to residue 158
Surplusage, when not prejudicial .... *ib.*
Substance of the usual Form *ib.*
When must be in Writing . *ib.*
When on Oath............... 159
When may be brought to the Justice ready prepared *ib.*
Consideration of each part of an Information.
1. Name and Description of Complainant or Informer 160
2. Time of exhibiting Information 161
3. Place of exhibiting ... *ib.*
4. Names of Magistrates, and their Jurisdiction . *ib.*
5. Whether or not on Oath 159
6. Name and Description of Offender 162
7. Time of committing Offence............. .... *ib.*
8. Place of committing Offence........ 163
9. Description of Offence 164
Requisite particularity in such Statement .. *ib.*
When merely in words of Statute insufficient 165
Should be as extensive as the facts will warrant .... *ib.*
Must charge Offence equal to that prohibited 166
Must be positive, &c. . *ib.*
Particular Words in the Statute, descriptive of Offence, when essential .... *ib.*
Averments negativing Exemptions or Qualifications .... *ib.*
10. Conclusion, *Contra formam Statuti* 168
11. *Contra Pacem* 169
Several Counts for different

Page

II. Practical Proceedings, &c. (*continued*).

Fifthly, Of the Information or Complaint (*continued*).

Offences or varying Descriptions 169

Prayer that the Offender be summoned 170

Defects in Information, when aided 170, 158-9

Several Forms of Informations under recent Acts 171-2, in notes.

1. Common Assault and Battery, on 9 G. 4. c. 31. s. 27 171
2. On 7 & 8 G. 4. c. 29, s. 40, for breaking a Dead Fence, with intent to steal the same ...... *ib.*
3. On 7 & 8 G. 4. c. 30, s. 24, for a wilful or malicious Injury .. ... *ib.*
4. On Game Act, 1 & 2 W. 4. c. 32, s. 30, for a Trespass, in pursuit of Game 172

Sixthly, Oath to obtain Summons on recent Acts..... ...... 171, 2, 3

Form thereof......... 173, n. (*b*)

Seventhly, The duty of Justices to receive an Information, and issue Summons or Warrant... 173

Eighthly, The Summons and requisites 174

Form of Summons, after Oath.......... .... 177(*c*)

Ninthly, The *Service* of the Summons 177

Tenthly, Warrant to apprehend Offender 178

Form of Warrant...... ..179, (*q*)

Eleventhly, Search Warrants ... 179

Form of Warrant to apprehend, to answer a summary Complaint or Information 179

Twelfthly, Of securing Evidence and Attendance of Witnesses on the Hearing........... 181

Form of Summons to Witness....................182,(*g*).

Page

II. Practical Proceedings, &c. (*continued.*)

Thirteenthly, The Hearing and Proceedings before one or two Justices, &c....................... 182

Jurisdiction and Number of Justices 183

Non-attendance of Defendant, and Proof of Service of Summons 184

Of Confessions .... *ib.*

Of Adjournments 185

Reading Information to Defendant, and his Objections thereupon..... 185

Right to appear by Counsel or Attorney, and have their *private* assistance... 186

Right of third person uninterested to be present, but not to take notes 187

The Evidence and Witnesses 188

Oath of Witness .... *ib.*

Mode of Examination, &c.. 189

Mode in which Evidence must be taken down...... *ib.*

The Defence................... 191

Evidence in support of Defence. .... *ib.*

Defence under *bonâ fide* Claim of Right .... *ib.*

Fourteenthly, Of postponing Decision of Justices, and necessity for Presence of all the convicting Justices *together* at Time of deciding 192

Fifteenthly, Of Amicable Adjustments and Compromises by the Intervention of Justices ... 193, 4

Sixteenthly, The *Decision*, Acquittal or Conviction, by Justices.............................. 194

1. *Acquittal*, and Record or Certificate thereof......... *ib.*

Formal Judgment of Acquittal .... *ib.*

Certificate of Dismissal under 9 G. 4. c. 31. s. 27, 28 195

2. *Convictions* .... *ib.*

Time of Delivery of Copy or returning Original to Sessions 196

Page

II. Practical Proceedings, &c. (*continued.*)

Sixteenthly, The *Decision*, &c. (*cont.*)

3. *Form of Conviction*, as prescribed by 3 G. 4. c. 23. s. 1. 196
4. Formal Part and Requisites of Convictions in general .... *ib.*
5. Requisites of Conviction in general.
   1. When prescribed Form imperative, and consequences of Deviation 198
   2. Recital of Information .... *ib.*
   3. Statement of Appearance and Defence 199
   4. Of Confession .... *ib.*
   5. Of Evidence .... *ib.*
   6. Of stating Evidence for Informer 200
   7. Mode of stating Evidence for a Defendant 201
   8. What Evidence on face of Conviction sufficient to sustain it 202
   9. The Form of Adjudication in general . *ib.*
   10. As to Adjudication negativing Exceptions 203
   11. Statement of the Offence in Adjudication 204
   12. Certainty in stating the Offence 205
   13. Uncertainty in Information, when aided by Conviction ... *ib.*
   14. Conviction of several Offences .... *ib.*
   15. Adjudication as to Forfeiture, Punishments, &c. 206
   16. As to Distribution or Application of the Penalty 207
   17. As to Costs .... *ib.*
   18. Conclusion of Conviction, and the Date, Signing and Sealing 208

Page

II. Practical Proceedings, &c. (*continued*).

Seventeenthly, Conviction upon *particular* Statutes 209

Eighteenthly, Defects in Convictions in general, where aided . 210

Nineteenthly, Delivery of Copy of Conviction to Defendant, and returning original Conviction to Sessions 211

Twentiethly, Enforcing the Payment of Penalty or Punishment 212
1. In general, by what Process .... *ib.*
2. By Distress Warrant, when *ib.*
   No Replevin lies 213
   Sale of Distress, when *ib.*
3. By Warrant of Commitment .... *ib.*

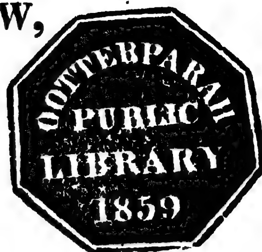
Twenty-firstly, Appeal to Sessions 214
1. Recognizance 215
   Form of, under Game Act, 1 & 2 W. 4. c. 32. 215, 216
2. Notice of Appeal 216
3. *Form of Judgment of Affirmance* of the Sessions, on an Appeal against Conviction, under 1 & 2 W. 4. c. 32 .... 216, 217
   Costs of Appeal 217
   When the fact of Sessions quashing Conviction, not conclusive .... *ib.*
   Mandamus to compel Justice to state Evidence, &c. in Conviction, under 3 G. 4. c. 23 218

Twenty-secondly, Of Writs of Certiorari 219
   Time within which Writ must be moved for, and the Notice thereof required 221
   Notice of Motion for Writ, and Affidavit of Service thereof 222-23
      Form of Notice 223, n. (*d*)
   Affidavit in support of Motion for Certiorari 223
      Form of such Affidavit 224
   Grounds on which Court will or not allow a Certiorari . *ib.*
   Recognizance, proper Form of 225

THE

PRACTICE OF THE LAW,

&c., &c.



PART THIRD.

CHAPTER I.

OF THE RETAINER OF A LEGAL AGENT.—AND OF ATTORNIES, SOLICITORS, PROCTORS, CERTIFICATED CONVEYANCERS AND NOTARIES,—AND OF SPECIAL PLEADERS AND BARRISTERS.

I. REASONS why an admitted LEGAL AGENT should be retained - 1
II. Of ATTORNIES and SOLICITORS 4
First, Of the retainer of an attorney, &c. - - *ib.*
Secondly, The Qualifications of an attorney, &c. - *ib.*
1. The articles of *clerkship* and terms thereof suggested - - 5
2. Points to be observed before the execution of articles - - 10
3. What service is requisite - - - *ib.*
4. Affidavit of service - 11
5. Examination as to fitness and admission - 12
6. Of the *education* before and pending articles - 13
Thirdly, When want of qualification may prejudice client - - - 15
Fourthly, Precautions to be observed in retaining an attorney in general, &c. 16
Purchaser not to employ vendor's attorney - - 17
Attorney, when not afterwards to be concerned against client - - 18
Fifthly, Propriety of written retainers - - 20
Sixthly, Duty of attorney *properly* to state a case and obtain opinion of counsel - - - 21
Seventhly, Where principal attorney, to conduct the proceedings *himself* - 23
Eighthly, His duty in negociations - - -
Ninthly, Other duties. - 24
Tenthly, His remuneration and costs - - - 26
Eleventhly, His liabilities - 32
III. Of PROCTORS - - - 33
IV. Of CERTIFICATED CONVEYANCERS - - - - 34
V. Of NOTARIES - - - 35
VI. Of STUDENTS, SPECIAL PLEADERS, and BARRISTERS - 36
First, Becoming a member of one of the Inns of Court, and being called to the bar - - -
Secondly, Of their studies and attainments - - 39
Thirdly, Of some of the functions of a Special Pleader and Barrister, as regards Chamber Practice, and particularly in giving opinions - - 42

CHAP. I. REASONS FOR RETAINING A LEGAL AGENT.

1. Reasons why some regularly educated and admitted *legal* agent must be retained in certain professional business.

IN the preceding parts of this work we have considered some subjects connected with litigation, many of which might, perhaps, although rarely with security, be conducted without the actual assistance of a professional adviser. But we are now to suppose that an injury having been completed, compensation cannot probably be obtained without some description of formal litigation. Here, however well informed the party injured, or the wrong doer may be, yet experience has established that in

CHAP. I.
REASONS FOR RETAINING A LEGAL AGENT.

general it is most prudent to employ some *Professional Agent* to conduct the proceeding, as well to avoid personal collision with the opponent, as to secure a temperate and discreet line of conduct. which otherwise might be prejudicial, especially during the trial or hearing of a cause. (*a*) Besides, there are so many technicalities in the course of legal proceedings, that even the most experienced barrister would probably commit some blunder in the *practical* steps, if he should attempt to conduct his own suit through the different offices and stages of litigation, however superior he might be in his own particular department, *i. e.* in argument and discussion in court or before a jury, to which, in the course of his particular department, his attention has usually been confined. (*b*)

The authorized agents in legal proceedings, especially in conducting a suit to trial or hearing, are *Attorneys at common law, Solicitors* in *equity*, (*c*) and Proctors in the *Spiritual* and *Ecclesiastical* Courts; whilst in preparing certain notarial and commercial proceedings, *Notaries* are employed; and *Conveyancers*, either at the bar or *certificated* (in the latter case usually termed *Certificated Conveyancers*,) principally prepare conveyances, deeds, contracts, and wills, when attended with any difficulty or of considerable importance.

When *Advice* is required upon the *rights* of the parties or the *practical proceedings* or *evidence* beyond that which the attorney or solicitor thinks himself competent to give, special pleaders or, in more weighty matters, barristers are usually consulted upon a verbal, or more frequently upon a formal written statement.

Barristers, frequently called *counsel*, are also retained to state to the Courts of *Law*, on motions and other proceedings; or on *trials*, to the judge and jury; or in Courts of *Equity*, on motions or hearings to the Chancellor or other Equity Judge, bills and answers or affidavits, and to argue in support of the the client's interest upon the result.

(*a*) In general, a party in a cause is under too much excitement to conduct it himself with due temperance and discretion; and although there are exceptions where a few talented individuals seem even to have derived advantage from their irregularities or non-observance of technical rules, yet any one acquainted with Courts of Justice well knows, that in general a party undertaking the conduct of his own case greatly prejudices it.

(*b*) It is, however, still competent to a party in a *civil suit*, to sue or defend for *himself* in person. *La Grue* v. *Penny*, 2 Hen. B. 600. *Ward* v. *Netheriote*, 7 Taunt. 145. But this does not extend to prosecutions of *criminal charges*; and even a motion for a criminal information cannot be made by a private individual in person. *Rex* v. *Justices of Lancashire*, 1 Chitty's Rep. 602.

(*c*) It is a vulgar error that the term *solicitor* is more honourable, or superior to that of *attorney*. Lord Tenterden repeatedly animadverted upon the absurdity of using the former term or name, when applied to any one conducting an *action* or other proceeding in Courts of *Law*. There is no distinction in the degree of respectability, any more than there is between Barristers practising in one Court or the other.

CHAP. I. REASONS FOR RETAINING A LEGAL AGENT.

With respect to the *exclusive right* of these several legal agents to conduct such proceedings on the behalf of their clients, some disappointed individuals have ever been found to decry all prohibitory regulations which tend to exclude or rather *delay* talented individuals who have attained manhood from gaining subsistence in the department of the law, because they have omitted in early life to qualify themselves by regular apprenticeship or articles, or study as members of one of the Inns of Court, or to conform to what they would term arbitrary regulations. As respects most departments of science, as for instance that of the medical profession, the propriety of similar exclusion has been frequently and ably argued.(*d*) It may suffice here to observe, that it is but just that those who have devoted many years of their youth in expensive education and regular moral habits, for the express purpose of obtaining admission to practice in the law, ought to be protected from the inroads of even the most talented adventurers, who, if they were without similar discipline, allowed to practise, would frequently, from adventitious circumstances become popular, and supplant the more regular practitioners. Besides, as professional men have great influence in society, not only as regards property, but in counteracting the litigious inclination of their clients when so disposed, (*e*) it is but fit that before a party be admitted to practise, his *moral* character as well as his *legal skill*, should long have been under control or observation, and that he should be well examined respecting each, and approved by some competent tribunal; and as regards barristers in particular, who from the nature of their avocation must aggregate and be constantly in collision with each other, it is peculiarly essential that there should be some at least probable security, that each member of their fraternity has been duly educated, and is influenced in his conduct by all the principles becoming a gentleman; for otherwise the society of some of the members of the profession would soon become intolerable. At the same time it must be admitted, that the Judges who have to decide upon the fitness of a clerk to be admitted to practise as an attorney or solicitor, and the benchers of the Inns of Court who have to determine on the propriety of admitting a gentleman to the bar, have a delicate and anxious office to fulfil; since, after

(*d*) See Gray's Pharmacology, 4th edit. A. D. 1828. Preface, per tot. &c.

(*e*) Some might suppose this expression ironical; but experience establishes that by far the greater proportion of respectable attornies and solicitors, especially those practising in the country, preferring general good character to the petty gains incident to trifling litigation, do most materially contribute to harmonize their neighbours, and confine litigation to questions of real importance.

CHAP. I. REASONS FOR RETAINING A LEGAL AGENT.

a youth has devoted five years of expensive study with a view to admission in the particular department, it would be painful to blight his prospects by rejecting him without strong and almost imperative reasons, either on account of total and dangerous inability or grossly immoral conduct, rendering the individual unfit to be entrusted with the interests of third persons. And on this ground, as far as regards students for the bar, the benchers of the Inner Temple have introduced a wholesome regulation for examining a youth upon his classical education and his probable fitness, even before he can be admitted as a *student*; so that if he be rejected thus early, he will not have to complain of the loss of time or intervening expense.



II. OF ATTORNIES AND SOLICITORS.

Principal regulations to be observed efficiently to become an attorney or solicitor.

It is not my intention here to attempt to state in detail all the law relating to the admission, enrollment, certificates, or re-admission of attornies or solicitors, or to their privileges, disabilities, and duties, or the consequences of their misbehaviour. These have been ably collected and commented upon by Mr. Tidd, in his scientific Treatise on Practice; (*f*) and in some minor essays, in imitation of that excellent standard work. I shall here, pursuing my elementary plan of *anticipating* and *preventing* inconveniences or injury, and principally with a view to advise the parents of *articled clerks*, and themselves, how to avoid delay or other inconvenience, merely state the *principal regulations*, the non-observance of which might wholly defeat the utility of the articles, and preclude a clerk after his five years' services from being admitted; together with those rules and decisions which have either been omitted in prior treatises, or too lightly touched upon; and I propose to introduce some observations on the *previous education* of articled clerks, as well as that to be pursued *during* their clerkship; and upon the *duties* of all practitioners as prescribed by different judges, and here suggested for their improvement, and through them ultimately for the benefit of the community.

Twenty-two points to be observed.

The whole of the proceedings to be taken to enable a person to practise legally as an *attorney or solicitor*, may be arranged in the order in which they naturally arise, as 1, the *master*, who must be a regular practising attorney; 2, the articles of clerkship; 3, the stamp thereon; 4, the affidavit of the execution of the articles to be filed within *three months* after their date; 5, the entry of such affidavit; 6, the enrolment of the articles with the affidavit of the execution *within six months*,

(*f*) Tidd's Practice, 9 ed. chap. iii. p. 60 to 90, and *id.* Chap. xiv. p. 319 to 340.

and the registry of the former; 7, the affidavit of such enrolment and of the payment of the duty; 8, the service under the articles; 9, the necessity for fresh articles to make up for any lost time; 10, the affidavit of the regular service; 11, the master's certificate of regular service, which although usual, may be dispensed with; 12, the notice of the clerk's intention to apply for admission, to be affixed outside the Court; 13, the entry of such notice at the judges chambers; 14, the examination before the judge; 15, the petition and affidavits to obtain admission in case of difficulty; 16, the oaths to be taken, and swearing the same; 17, the stamp on admission; 18, the admission itself; 19, the enrolment of the name of the admitted attorney on the rolls of the Court; 20, the entry of the name of the admitted clerk, and of the place of abode; 21, the annual certificate and stamp duty thereon; and, 22, the entry of the certificate with the proper officer of the court. Of these it will be obvious, that the most important are the *first eight;* because their non-observance may render a fresh binding essential, and indeed, as regards the latter, the information which the clerk will obtain during his articles, will probably enable him to prevent any material error or inconvenience.

First of the *Articles.*

With respect to attornies and solicitors, no person can be *admitted* to *practise* as such, " unless he has been bound by " *contract in writing* to serve *as a clerk* for and during *the* " *space of five years* to an attorney or solicitor, duly and legally " sworn and admitted in one of the Superior Courts at West- " minster, or in some Court of Record in England," as mentioned in the act. (*g*) The full term of five years must be *prospective,* and the articles must not be antedated nor executed after the five years have commenced; this results from another statute, requiring an affidavit of due service during the *whole* term, as presently noticed. It is suggested and recommended, that to provide for the possibility of unforseen circumstances arising, that might occasion some absence during the prescribed term, and prevent the possibility of the party truly swearing to a service during the *whole* of the term of five years, and render it necessary to have a new contract of binding to make up such full term, it is prudent to bind the clerk, in the first instance, for a term *rather more than* five years, as for instance, for *six* years, with a proviso and covenant, that after the clerk has duly and actually served *full five years* of that term, he shall be at liberty to depart and obtain his admission, and that the master will assist and facilitate his obtaining the

(*g*) 2 Geo. 2. c. 23, sect. 5 and 7, made perpetual by 30 Geo. 2, c. 19.

same; (*h*) for otherwise, in case of wrongful absence during any part of the limited term of five years, the requisite affidavit of service could not safely or conscientiously be made; and it would be necessary to have *fresh* articles for a *further* term, sufficient with the previous actual service to make up for such lost time, (*i*) and not a mere *assignment* of the first articles;

(*h*) See *Ex parte Tench*, K. B. Trin. T. 1827, where the applicant had been articled for *six* years, and had, during that term, actually served although at *different* times, more than five years, taken collectively, though he had been wrongfully absent at other parts of the term; and it was holden per Bayley, J. that his affidavit of such *partial* service was sufficient to entitle him to his admission. K. B. on motion of Chitty. See Chitty's ed. Stat. p. 66, note (*o*). And see the affidavit and rule in the proper office. In case the binding should be for more than the term of five years, then the suggested proviso may be thus.

Suggested clause in articles for *more* than five years, that after due service for *five years*, the clerk may be admitted to practise *for himself*.

"Provided always, and it is hereby declared, covenanted, and agreed by and "between the said parties, that when, and *as soon* as the said *C. D.* shall have *duly* "*served* the said *A. B.*, or his assigns, or any other person that shall or may by "rule or order of any Court, or otherwise according to law, have become his "master, under and by virtue of these presents, or under any other lawful con-"tract, in the whole for and during the full term of five years, part of the said term "of years hereinbefore mentioned, and according to the true intent and meaning of "these presents, and also as required by the statutes and rules in that case made "and provided; then it shall and may be lawful for the said *C. D.* to give one *week's* "notice, in writing, to the said *A. B.*, or his then master for the time being, of his "desire and intention no longer to serve him or any other person under such articles, "or under any such other contract, and from and after the expiration of one week "from the time of the due service of such notice, it shall and may be lawful for the "said *C. D.* thenceforth to depart and continue absent from any further service "under these presents, or such other contract, and from thenceforth the said article, "and other contract, shall cease to be obligatory on the said *C. D.* as to any pro-"spective purposes; and thereupon the said *A. B.*, and his executors, administrators "and assigns, and any new master, shall and will, at the request, costs and charges "of the said *C. D.*, sign such certificate, and execute, do and perform all such acts "that shall or may be requisite, useful, or advisable, to enable the said *C. D.* to be "admitted to practise for himself as an attorney or solicitor."

(*i*) In case further articles or a fresh contract should be necessary, then the same should be framed, reciting the former articles, and the substance of the covenants therein, and should then recite the past service under the same, and the event which has rendered it necessary to have a new contract, as thus:

Terms of new articles to make up for lost time.

"And whereas, in pursuance and under and by virtue of the said articles, the 'said *C. D.* did duly and faithfully serve the said *A. B.* as such articled clerk as 'aforesaid, in part performance of the same articles, and the covenants therein 'contained, and the statutes and rules relating to and requiring such service, upon 'and continually from the said —— day of ——, A. D. ——, until and upon the '—— day of ——, A. D. ——, making in the whole the term of —— years and —— 'months and —— days, of faithful and sufficient service of the said *C. D.*, under 'and in pursuance of the said articles. And whereas, upon the —— day of ——, 'A. D. ——, the said *C. D.* absented himself from the service of the said *A. B.*, 'under and in pursuance of the said articles [if an excusable or not culpable 'cause, *state it*, but otherwise, let the recital be general, as follows], and ceased 'and neglected duly to serve as such clerk from that day until the time of the ex-'ecution of these presents. And whereas, the said *A. B.* and *C. D.* and *E. F.*, his 'father, are respectively desirous that the said *C. D.* should be bound to serve, and 'should duly serve as such clerk, under and in pursuance of sufficient articles, and 'for and during such a time and term as will enable and entitle him to be admitted 'to practise as an attorney and solicitor; and for that purpose the said *C. D.* and '*E. F.* have requested the said *A. B.* to receive and retain him to serve accordingly, 'and to execute fresh articles of clerkship for that purpose; and which the said "*A. B.* hath consented to do. Now therefore, &c." [here state the new binding to commence from the time of executing the fresh articles, and for a term fully sufficient, and even more than will be requisite to complete the full term of five years faithful service, and insert the like covenants for faithful services as in the original articles, and proviso for cesser, as *supra*, in the first form.]

and such fresh contract must be stamped with the same duty as was payable on the original articles; and though the stamp on the first articles would be allowed on delivery up of such original articles to the Commissioners of Stamps within six months after execution of the new articles; (k) in the mean time there must have been an advance of the amount, and the consequence of the irregularity would be attended with at least temporary anxiety and some trouble and extra expense, which by an original binding for *six* years would have been avoided.

It should seem, that in strictness, whenever the original binding is for *five* years only, if the master should die or cease to practise, and *some time* elapse before a new master has been legally constituted; or if the clerk should on a quarrel, or otherwise indiscreetly leave his first master, even for a *few days*, without having been previously assigned, *some loss* of time in either of these events would necessarily take place, and during which there would be no *legal service;* and consequently the trouble and expense of *new* articles must be incurred; (l) so that clearly it is most prudent, in the *first* instance, to let the binding be for a term of *six* years, determinable as above suggested, by which an occasional short absence would not prejudice. These cases, however, together with others, appear to establish, that though there must be a service *altogether* of *five years*, yet, provided the full number of days of service *under articles* have taken place, though at *different* intervals, that will suffice, and that the service need not absolutely be *continuous.* (m)

By the terms of the act it will be observed, that the service must be to "an attorney or solicitor *duly and legally* sworn and admitted in a Court of Record, &c.;" and he must be boná fide a *continuing practising* attorney or solicitor, and not have left off practice, (n) and he must be practising as a principal on his own account, and not serving as a writer or clerk to another attorney, (o) though it is expressly provided that the neglect of the master to obtain his *certificate* shall not invalidate the service of his articled clerk. (p) A binding to the Prothonotary or Secondary of the Superior Courts, or to the Master of the Crown Office (q) will suffice; the instruction and knowledge to be obtained in their offices being considered

(k) 55 Geo. 3. c. 184. Schedule i. tit. Articles.

(l) *Ex parte Rowle*, 2 Chitty's Rep. 61.

(m) *Carter's case*, 2 Bla. R. 957. *In the matter of William Smith*, 1 Dowl. & R. 14. Chitty's Col. Stat. p. 66, note (o).

(n) 22 Geo. 2. c. 46, s. 7.

(o) Rule Trin. T. 31. Geo. 3. c. 2.

(p) 1 W. 4. c. 26, s. 6.

(q) 2 Geo. 2. c. 23. s. 16.

CHAP. I. OF ATTORNIES AND SOLICITORS.

adequate tuition for an attorney; (r) and since the 23 Geo. 2, c. 26. s. 15, a person who has served as an articled clerk to a *solicitor*, and been admitted to practise as a solicitor, is entitled to be examined and admitted, if competent, to practise as an *attorney*, and *vice versa;* so that now, in effect, a binding and service to a *solicitor* entitles a person to be admitted as an *attorney* upon his establishing, to a judge of the Common Law Court, his competency to conduct that department of business, and *vice versa.* (s)

Exceptions also have been introduced by recent enactments with respect to the duration of the *time of binding* and service, in favor of persons who have evinced, that they have, at least probably, received a liberal education. Thus, the 1 & 2 Geo. 4, c. 48. s. 1, and 3 Geo. 4, c. 16, enact, that if the proposed clerk have taken the degree of Bachelor of Arts or Law, in the Universities of Oxford, or Cambridge, or Dublin, within the next immediately preceding four years, then it shall suffice if he be articled to serve as clerk to an attorney or solicitor for *three* years instead of *five;* provided also such degree of Bachelor of Arts had been taken within six years, or such degree of Bachelor of Law had been taken within eight years after matriculation. These exceptions were, however, only introduced in favour of superior education at one of *the Universities*, and that also within a *recent* period, which it was considered would adequately supply the place of two out of the five years actual service under articles. The 1 & 2 Geo. 4, s. 2, only contains an exception which rather affects the time and mode of *service*, than the time of *binding*, for it provides that if a clerk has been articled for five years he may *serve part* of the time, not exceeding one year, as pupil to a practising barrister or certificated special pleader. (t)

It further seems, that the person to be articled to an attorney for the purpose of admission must be *bonâ fide* articled *as a clerk to learn the profession of the law;* and therefore, where an attorney took a turnkey of the King's Bench prison as an articled clerk, evidently for the purpose of securing the business of the prisoners, the Court ordered the articles to be cancelled. (u)

(r) 49 Geo. 3. c. 28.

(s) 23 Geo. 2. c. 26. s. 15. Tidd. Prac. 9th ed. 72, 3.

(t) The act is silent, and therefore extends to a practising *barrister* in any department in common law, equity, criminal bar or conveyancing. The act does not provide for clerks who serve a year or less with a *certificated conveyancer*.

(u) *Fraser's case*, 1 Burr. 291; and see *Ex parte Hill*, 2 Bla. R. 391. *Re Taylor*, 5 Bar. and Ald. 538.

Terms of the articles, and suggestions for improvement.

With respect to the *terms* and *covenants* in the articles, the statutes are silent except in the requisites of the service in the professional department during the term of five years. Considering the importance of the contract, as intended to secure proper professional education during so long a term, and to enable a youth afterwards to practise for himself with advantage, articles of clerkship are generally very improvidently framed, without adequate covenants on the part of the master, or any proper stipulations providing for return of premium on the event of death, or other determination of the service before the end of the term. There are many events that ought to be more cautiously provided for. It has lately been considered by high legal authority, that there can be no objection in law to a stipulation to pay a reasonable salary to the clerk, although during the term of his articles, or a covenant that at the end of the term, if he have duly served, he shall be taken into partnership; and, perhaps, the master might, in consideration of the binding, and even without a premium, legally covenant to pay the widow or family of a deceased attorney a fixed annuity in consideration of the connection of the deceased father which he has or will acquire. (*v*)

The principal attorney may reasonably require the clerk and a responsible person, by the articles, to covenant for his due services, to stipulate that at the expiration of the term he will not set up in the same profession within a reasonable limited distance (perhaps even 50 miles, (*w*) nor accept or conduct business from any person, who has at any time during his clerkship, been a client of his master's; and it would be reasonable and proper, if not necessary, very particularly to stipulate, that at no time, either during or after the expiration of the term, shall the clerk, either directly or indirectly, be concerned for any person in any business or transaction adverse to the interest of any person who shall have been a client of his master at any time during his clerkship, nor at any time communicate, or in any way directly or indirectly use or take advantage of any knowledge of facts acquired in the office of his master, or in consequence of his having been in his office, so as directly or otherwise to prejudice or injure his master or any or either of his clients; nor cause, or enable, or suffer, or permit any other person so to do. A stipulation of this nature,

(*v*) Such a stipulation could not be a violation of 2 Geo. 2. c. 23, s. 17. 22 Geo. 2. c. 46, s. 11.

(*w*) *Bunn* v. *Guy*, 4 East's Rep. 190. See cases as to restraint of trade, &c. referred to in *Hemlock* v. *Blacklove*, 2 Saund. Rep. 156, note 1; and *Young* v. *Timmins*, 1 Tyr. R. Exchcq. 226.

CHAP. I. Of Attornies and Solicitors.

for reasons before suggested, is highly essential for the protection of the clients of the master, who have by the dishonourable conduct of articled clerks sometimes been most seriously injured. (*x*) The observance of such stipulations should, as far as practicable, be secured by every possible provision as to the payment of fixed damages as a *debt*, and not as a penalty, for otherwise it will frequently occur that juries will give mere nominal damages, although the proof has established a most injurious violation of the engagement. (*y*)

In case the articles should contain no stipulation for a return of premium in certain events, the Court of K. B. appears to exercise a summary jurisdiction so as to compel an equitable apportionment without resorting to a Court of Equity. (*z*) But it would save much trouble and expence to provide expressly for all events, and prescribe a gradation or scale of the parts of the premium to be returned in each case.

Points to be observed before and after execution of the articles.

The age of the clerk and circumstances to be attended to at the time of his binding, and his previous education, will be presently considered, together with some suggestions upon his course of study. Care is to be observed that the articles be duly stamped before they have been engrossed, and consequently before they are executed, and that an affidavit of the due execution of the articles and date be filed within three months after such date, and that such articles be enrolled within six months after execution, pursuant to several statutes; for, though annual indemnity acts are usually passed, (*a*) the probability of that protection should not be depended upon. Besides, the omission might be urged by ill-natured individuals as a supposed defect in authority to practise, which might for a time, at least, be prejudicial when commencing practice.

What *Service* under the articles, and what affidavit of such *service* are essential.

The same statute that requires a binding for the term of five years, also renders it essential "that such person, for and "during the said term of five years, shall have *continued* in "such service;" (*b*) and the subsequent statute 22 Geo. 2, c. 46, s. 8, still more expressly requires that the clerk "shall, "during the *whole term and time of service, to be specified in* "*such contract*, continue and be *actually* employed by *such* "attorney or solicitor, or his or their agents, in the *proper* "business, practice or employment of an attorney or solicitor."

(*x*) *Ante*, Part 2, page 436, note (*a*); *id.* 706, note (*q*), where see the necessity for such a stipulation; and see *post*.

(*y*) See *ante*, 872, as to the construction of agreements to pay stipulated damages, and their not being enforceable unless where the most cautious terms have been used.

(*z*) *Anonymous*, see 2 Barnard, 227; *id.* 331. *Ex parte Prankerd*, 3 Bar. & Ald. 257; 1 Chit. Rep. 694. S. C. *Ex parte Bayley*, 9 Bar. and Cres. 601.

(*a*) See the last, 3 W. 4, chap. 7.

(*b*) 2 Geo. 2. c. 23, sect. 5 & 7.

The 9th section provides for the death of the master or his leaving off practice before the end of the term, and also for cancelling the contract by mutual consent; and for the clerks being legally discharged by rule of court, before the end of the term. And in either of these cases it is provided that another contract, on wishing to serve for the *residue* of the term, may be made, and that service under such fresh articles shall suffice. The 34 Geo. 3, c. 14, s. 8, more extensively provides for the determination of the articles by *any other event*.

The 22 Geo. 2, c. 46, s. 10, moreover requires, before admission, an *affidavit* of the clerk or his master, to be made and filed, that he had actually and really served and been employed by such practising attorney or solicitor to whom he was bound, or his agent, during the said *whole* term of five years, according to the true intent of that act, *viz.* in the *proper* business, practice, or employment of an attorney or solicitor.

Considering the former act of the 2 Geo. 2, c. 23, s. 5 & 7, and the above express clauses in the 23 Geo. 2, c. 46, s. 9 & 10, as to the requisite service and affidavit of service, it is clear that the legislature intended to require a *bonâ fide exclusive continuing service* to the master named in the articles, and *no other*, so that at least there should be no conflicting duties or incompatible occupations, and that the clerk should at all reasonable times be under the *immediate* controul of the master, in pursuance of and according to the terms of the articles; and accordingly it has been decided, that the statute is not complied with by the clerk's serving part of his time with *another* attorney, not his agent, though with his master's consent; (c) and the whole time must be at the disposal of the master, and no part of it otherwise *officially* employed; and it has been even held, that if a clerk should have obtained his admission, not having so served, he may be struck off the roll; as where the clerk had been during the term of service under his articles occupied as a surveyor of taxes, although such his employment did not occupy an eighth part of his time. (d) And upon the same principle, the Notary's Act, 41 Geo. 3, c. 79, which required continued and actual employment of the clerk articled for seven years, was holden not to have been complied with by his attending as a banker's clerk daily till five o'clock, and after that hour going to his master, the notary, and presenting bills of exchange and preparing protests. (e)

(c) *Ex parte Hill*, 7 Term Rep. 456.

(d) *Re Taylor*, 5 B. & Ald. 538. *In re Taylor*, 4 Bar. & Cres., 341; 6 Dowl. & Ry. 428. S. C. *Rex* v. *Scriveners Company*, 10 B. & Cres. 511. *Ex parte Hill*, 2 Bla. Rep. 991.

(e) *The King* v. *The Scriveners Company*, 10 Bar. & Cres. 511.

CHAP. I. OF ATTORNIES AND SOLICITORS.

But a clerk articled to one attorney, partner in a firm, may comply with the statutes by serving all in their joint business; (*f*) and assisting another attorney at *extra hours* was considered as not breaking in upon a legal continuing service. (*g*) And it may be presumed that a clerk's receiving, with the concurrence of his master at least, during *extra* hours, instructions in sciences or languages calculated to extend his education, would not be held a violation of the intention of the legislature. So occasional recreation or short reasonable holidays, with leave of the master, especially in case of ill health, would probably not be considered as breaking the continuity of the service. In a late case, where an articled clerk who had served under the articles two years and a half, when he was prevented by *illness* from giving *regular* attention to business during the rest of the term, but attended as his health permitted, the Court admitted him on the ground that his strict regular service had been prevented by the act of God, and that the applicant had done all in his power to qualify himself. (*h*)

The expression in 22 Geo. 2, c. 46, s. 8, appearing to admit a service to the *agent* of the master to whom the clerk was articled as sufficient, was afterwards limited to *one year's service to such agent*, by a rule of court. (*i*)

It has been suggested, that if there has been a *bonâ fide* service, the Court will not be astute in construing the act; (*j*) and as an instance, the Court admitted a clerk to practise as an attorney where he had, with the consent of his master, served portions of his time to an agent, and although within two months of the expiration of the five years, he was absent from his duties, but *with the consent of his master* and the agent with whom he was engaged, but after the period of the five years he served out the two months. (*k*)

Of the *Examination* of the clerk before admission.

Before an articled clerk can be admitted, the statute 2 Geo. 2, c. 23, s. 2, directs, "That the judges of the Court or any "one or more of them shall, before they admit the person to "take the requisite oath, *examine* and enquire by such ways "and means as they shall think proper, touching his *fitness* "*and capacity* to act as an *attorney;* and if the judge or "judges shall be thereby satisfied, that such person is *duly* "*qualified* to be admitted to act as an attorney, then *and not*

(*f*) *Blunt's case*, 2 Bla. Rep. 764.
(*g*) Id. ibid.
(*h*) *Ex parte Matthews*, 1 Barn. & Adol. 160. *Ex parte Rowle*, 2 Chit. Rep. 61.
(*i*) Rule Trin. T. 31 Geo. 3. 4 Term Rep. 379.
(*j*) *Fletcher's case*, 2 Bla. R. 734.
(*k*) *Ex parte Hubbard*, 1 Dowl. Prac. Rep. C. 438.

" *otherwise*, the said judge or judges are to administer the oath " to him, and afterwards to cause him to be *admitted*, and his " name to be *enrolled* as an attorney." And the 6th section contains a like direction as to the examination and admission of *solicitors*. If there should be any difficulty in obtaining the admission, then if the clerk think he can surmount it, the course is to proceed by *petition* to the court, supported by full affidavits removing the difficulty; and the decision of the court upon which will be final; because the jurisdiction is discretionary, and there is no court of appeal or higher tribunal, unless indeed by petition to the House of Commons. (*l*)

In general, an attorney who has been admitted in one of the Superior Courts, has a right to be admitted to practise in *any Inferior* Court; but this is subject to the custom or practice of that Court, and if by established local law, there is only to be a *limited* number of attornies, and there be no vacancy, that is an answer to a mandamus from the Court of K. B. to examine the applicant previous to his application for admission to practise in such Inferior Court. (*m*)

Perhaps, considering the great influence that attornies and solicitors have over the property and peaceable intercourse of society, and the impropriety of admitting ignorant or otherwise improper persons to practise, it would be well if the superior judges were relieved of the trouble of examining clerks as to their fitness to be admitted, which, from the multiplicity of their other functions, they cannot perhaps exercise with sufficient scrutiny, and if the office were transferred to other delegated officers, with power of *appeal* to the judges, either for or against an admission. At present, compared with the examination instituted before admission to practise in the medical and some other occupations, the admission of attornies is much more facile as regards their legal as well as their moral attainments, than that of admission to medical practice.

Of the *Education* of articled clerks previous to, and pending their service.

With respect to the *preparatory education* of a youth intended for any department of the law, especially as an attorney or solicitor, it should be much more extended than has hitherto been customary. Parents would do well not to article their sons before they have completed their *sixteenth* year, and have finished with care and assiduity, at least a *good classical* school

(*l*) 2 Geo. 2. c. 23, s. 2 to 6; 23 Geo. 2, c. 26, s 15; 1 Geo. 4. c. 55, s. 4; and see the principle, *Rex* v. *Gray's Inn*, Dougl. 353; *Wooler's case*, 4 Bar. & Cres. 855.

(*m*) *Rex* v. *Sheriffs of York*, 3 B. & Adolp. 770.

education, and even that alone will scarcely be sufficient to enable a party afterwards to proceed through life with full advantage, much less to obtain great eminence. Even after the completion of a good school education, two or three years of study, under proper direction, of most of the useful sciences before he is to be articled, would be highly advantageous. It should be remembered, that to proceed with facility through any professional pursuit, an attorney should at least be *well* informed of the dead languages, the Greek and Latin, from which so many scientific terms are derived, not indeed in *law*, but in other branches of knowledge and literature ; for they may have to conduct suits and proceedings connected with *every science*, and therefore some previous knowledge of each would be desirable, and especially a full knowledge of physics or natural philosophy. All branches of society have, particularly of late, so much advanced in knowledge, that unless a professional gentleman be well acquainted with an outline of most sciences, he will when he starts in business, find himself too cramped in knowledge to act with safety, or without apparent embarrassment, from fear of exposure or error. A knowledge therefore of the outline of all that will probably be practically useful, should be acquired before the commencement of his *legal* pupillage ; and then about the age of sixteen (or even later if he be not previously fully prepared in these respects, and if the expence and seeming delay of a few years study at the University of Oxford or Cambridge cannot be afforded,) let him be articled for *six* years, (which by strict attention he may as above suggested shorten to five,) and then soon after the age of twenty-one, he would be ready to start for himself, or at least be able to accept for a time the management of an office as principal clerk, until by established character for professional skill, and by increasing age, he will have justly acquired the confidence of his relations and friends. Moreover, let him be articled to a gentleman himself of liberal education, and who will be anxious that his pupil shall blend an increasing knowledge of useful sciences with legal pursuits, so as to *permit*, if not *supply him* with assistance upon the former ; and he might even find it useful in practice to be acquainted with the art of drawing, at least so as to be able without expence to his client, to describe on paper, machinery, local situations, and other matters in aid of a cause. (*n*)

(*n*) As regards *practically useful sciences*, if they have not been acquired *before*, it is recommended that the study of the subjects discussed in Dr. Arnott's Elements of Physics and Natural History be pursued, and that courses of Lectures at the King's College or the London University be attended, with leave of the

By this means, much of the five years, otherwise irksomely long, may be profitably and cheerfully occupied in mental and technical improvements; and finally, having acquired enlarged and well cultivated understanding, he will be enabled to practise with honour and profit to himself and advantage to the community.

As regards his intermediate study, as well of practically useful sciences as of law, the student may borrow from the few hints presently offered to the student for the bar.

It should be further observed, that besides due knowledge of law and useful sciences, it will be of great importance that the youthful attorney should, as he progresses, study the distinguishing *temperaments* and *characters* of mankind, to which also the reading of biographical works would greatly contribute. He has to contend with the passions, the weaknesses of human nature, and not unfrequently, even against the cunning and iniquity of mankind; and consequently an attorney or solicitor who is a mere lawyer will scarcely ever attain eminence. This important truth will be particularly exemplified in the chapter relating to preparing a cause for trial or hearing, when the skill of an attorney may be particularly exemplified by his power of discrimination, and of justly anticipating the probable effect of the testimony of each witness. The study of *Man* should, therefore, be constantly in view, lest the practitioner be circumvented or incautiously mixed up with or contaminated by the bad propensities of his client.

How far the want of legal qualifications in an attorney may or not affect the client.

The foregoing rules and observations, as to the legal competency of a party to practise as an attorney or solicitor, apply rather to the party so acting than to his *client;* for although the incompetency to act on account of the want of regular admission or annual certificate, subjects the assumed attorney or solicitor to penalties of 50*l*., (*o*) and precludes him from suing excepting merely for giving advice, (*p*) yet the client

master, and at hours not incompatible with the duty of a clerk. As a simple instance of the utility of the knowledge of physics, or the laws of nature and mathematics, or rather of the consequences of ignorance, may be stated the result of an action where a young man had furiously driven his father's phaeton against a heavy coach on the road, and then pretended that *he* had driven moderately and the *coachman* furiously, and thereby induced his father to prosecute the coachman; and upon the trial the ignorant youth and his servant, and his equally ignorant attorney, assured themselves of success by zealously proving, perhaps beyond the truth, that the *shock of the coach was so great as to throw them down over their own horses' heads;* thereby necessarily proving that the faulty velocity was *their own* and not that of the coachman, because upon established principles such event could only be attributed to *excessive velocity in driving the phaeton*. Innumerable similar cases might be here instanced of the practical utility of knowledge and the application of it to even the most common subjects, but of which the bulk of society are still ignorant. 1 Arnott, El. Phy. 54.

(*o*) 2 Geo. 2. c. 23, s. 24; and 22 Geo. 2, c. 42, s. 12.

(*p*) *Smith* v. *Taylor*, 7 Bing. 260.

CHAP. I.
OF ATTORNIES AND SOLICITORS.

is not to suffer, at least, for the want of the certificate, and the proceedings on his behalf are sufficient and valid; (q) nor does the incompetency of the party acting as attorney deprive his client, when a plaintiff, of his right to full costs against the defendant. (r) But under the particular rule requiring the presence of an attorney when a warrant of attorney is executed by a defendant in custody under mesne process, it has been decided, that the presence of an uncertified attorney is not sufficient; (r) and in the first mentioned cases, if the client knew that the party employed was incompetent to act, probably a different rule would prevail, and the validity of his proceedings might be impeached. And in a modern case, where process was sued out in the name of A. by B., neither of whom were attornies of that Court, and had no authority of any other attorney to act in his name, the Court set aside the proceedings, and ordered A. and B. to pay the costs. (s) Upon the whole, therefore, it is most prudent for a party to ascertain that a person whom he is about to employ is an attorney of the proper Court, and is fully authorized to act therein, for otherwise, at least, he may sustain the delay and inconvenience that would result from some motion and rule upon the supposed defect.

Rules for a client's *selection* of an attorney or solicitor, proctor, &c.

With respect to the *selection* of an attorney or solicitor, some hints have already been given. (t) The following observations are not addressed, nor can be intended to apply to members of the profession who have been long established in practice, and are known to observe the true interests of their clients, as zealously as they despise low artifices to increase business, instead of counteracting the too frequent litigious dispositions of irascible clients. But a few observations upon the proper conduct of professional men, as *prescribed by different Judges*, may be useful to *students*, and those who are as yet *young* in practice. Many points of professional duty have already been suggested in detached parts of the work. We will collect a few other leading points, as well for the use of clients as for the profession.

A cautious party anticipating litigation, would naturally prefer an *experienced* solicitor, whose character has already been established; but these are frequently so previously engaged, as to be unable to undertake the business; or relationship or

(q) *Welch* v. *Pribble*, 1 Dowl. & R. 215; *Reader* v. *Bloom*, 10 Moore, 261; 3 Bing. 9. S. C. *Anon*, 2 Chitty's Rep. 98.

(r) *Vesye* v. *Dodd*, Tidd. *sup*. 57.

(s) *Hawkins* v. *Edwards*, 4 Moore's Rep. 603.

(t) *Ante*, Second Part, 435, 6.

CHAP. XI. RETAINER OF A LEGAL AGENT.

kind feeling may induce to the encouragement of a young practitioner, and whose zeal, constant attention, and activity, will frequently make up for the want of experience. Here the principal *desideratum* should be the *honourable* character and disposition of the practitioner; for many a good cause has been lost by the prejudice excited in the mind of a judge or jury, merely by the circumstance of the same being conducted by an attorney, known to have previously blundered, or been guilty of unprofessional or dishonourable conduct. When a cause is conducted by such a professional agent, it will frequently be even anticipated, that the witnesses have been tampered with; and the counsel themselves, knowing the general character of the attorney, will suspect the truth or correctness of his client's case; whereas, when he has received his brief from an attorney of known care and probity, he can venture fearlessly and boldly to examine and cross-examine witnesses according to his instructions, and need not anticipate either blunder or fallacy.

Purchaser not to employ vendor's attorney.

No prudent purchaser should employ on his own behalf an attorney or solicitor, who is also concerned for the vendor of the estate, or for the proposed grantor of an annuity; not only because a person so charged with conflicting duties, may not be so apt or prone as he should be, to discover flaws in the title of the vendor or grantor; but also, because in other respects the knowledge acquired by such a double agent, might prejudice the purchaser. (*u*) Indeed the discordant duties may become so conflicting, as to render it impracticable for an honourable solicitor to proceed on behalf of both employers.

A cestui que trust should not employ a trustee who is also an attorney, nor should he act as such.

It has been not unusual for professional gentlemen to be constituted trustees, by which they obtain such a controul over property, that difficulties may arise in subsequent family arrangements, and it may become necessary to institute a suit which otherwise might have been avoided. It has recently been settled, upon great consideration, that a trustee, whether he be or not an attorney, cannot act professionally, so as directly or indirectly to charge for his personal trouble, or for professional business connected with his trust, either in his office or for his benefit; hence it should seem that unless this rule of law be evaded, it is against the interest of any attorney, as it usually is of his client, that he should be appointed a trustee. (*v*)

(*u*) See 6 Vesey Rep. 631, *note*; *Bowles* v. *Stewart*, 1 Schol. & Lefr. 227; and illustrations, Sugd. Ven. & P. 8th ed. 8, 9. When a purchaser employs the vendor's attorney, he may be affected by the knowledge of, or notice to such attorney, of a defect in the title, or of prior incumbrances; *id. ibid.*; and see *Franklin* v. *Colhoun*, 3 Swanst. 301.

(*v*) *Turner* v. *Hill*, and per Lord Lyndhurst, in *New* v. *Jones*, 8 Aug. 1833; first reported in Legal Observer, Vol. vi. p. 410; *Baker* v. *Grosvenor*, MS.; and *Carmichael* v. *Willson*, 4 Bligh, 145, *contra*.

CHAP. XI. Retainer of a Legal Agent.

A solicitor should not be concerned against a person who has once been his client, in any transaction in which he might avail himself of previous confidential communication.

Nor should a solicitor undertake any suit or business, in transacting which he might and probably would be able to take advantage of a knowledge of facts previously communicated to him confidentially or incidentally, from other business transacted for another client, and injuriously to the latter; and indeed, if he do, we have seen that in general a Court of Equity would restrain him from so doing: (w) and it is a general rule in equity, that an attorney or solicitor cannot give up his client, and act for the opposite party in any suits between them; (x) and he may by anticipation, upon sufficient grounds of apprehension, be restrained from communicating his client's secrets, or any communication of facts made to him professionally; (y) and solicitors in partnership cannot dissolve their partnership, as against their client, without his consent, at least so as to enable the retiring partner when discharged to act against him; (z) and the practice of one solicitor and clerk in court to be concerned for all parties, though admitted, was disapproved by the late Lord Chancellor. (a) And the same objection would probably be applied to a London agent acting in that character for the country attorney, as well of the plaintiff as the defendant, though when he merely transacts the *formal* steps in the cause, no inconvenience can probably result.

But where a clerk to a solicitor had commenced practice for himself, a Court of Equity refused to restrain him from acting as solicitor for parties against whom his master was employed, upon a mere *general* allegation of his having in his former service acquired information likely to be prejudicial to the clients of his master. (b) Hence the great risk of leaving title deeds, abstracts, or any secret information exposed in the office of a solicitor accessible to his clerks, (c) and the expediency of stipulating, in articles of clerkship, against the possibility of the clerk acting injuriously to the interests of clients, and for clients themselves stipulating in certain cases for a guarantee from their attorney or solicitor against such consequences. (d)

Propriety of requiring a written retainer to sue or defend.

There can be no doubt, from reading some ancient statutes,

(w) *Robinson* v. *Mullett*, 4 Price's Rep. 353; *Cholmondeley* v. *Clinton*, 19 Ves. 261; and see *ante*, 705, 6; and read the cases of *Beer* v. *Ward*, 1 Jacob R. 77; *Escott* v. *Price*, 1 Simon's R. 483; *Newberry* v. *James*, 2 Meriv. 446; and see Chitty Eq. Dig. tit. Professional Confidence, p. 1183; id. tit. Solicitor and Client, p. 1238. The student could examine all the cases under the latter title.

(x) *Cholmondeley* v. *Clinton*, 19 Ves. 261.

(y) *Id. ibid.* 261; *Beer* v. *Ward*, 1 Jac. 77; *Morgan* v. *Shaw*, 4 Madd. Rep. 57.

(z) *Cholmondeley* v. *Clinton*, 19 Ves. 273.

(a) *Id. ibid.*

(b) *Brichcno* v. *Thorp*, 1 Jacob R. 300, *ante*, 706.

(c) *Ante*, 436, note (a), and the *Newcastle case*, 8 Ves. 141; and Sugd. V. & P. 8th ed. 306.

(d) *Ante*, 9, 10.

that the Legislature considered it essential that an attorney should actually file his written warrant or authority to sue; and although it has ceased to be the practice of late to take any *written* authority from the client, whether plaintiff or defendant, as well at law (*d*) as in equity, (*e*) such omission has been censured; and if the authority to sue or defend or take the proceeding should be disputed, the inability to produce a written authority would create a prejudice against the attorney. Lord Tenterden, C. J., said (*f*) "I think it right to state that "*every respectable attorney ought*, before he brings an action, "to take a *written* direction from his client for commencing "it; and he ought to do this as well for his own sake as for "the sake of his client. It is much better for him, because it "gets rid of all difficulty about proving his retainer; and it "would also be better for a great many clients, as it would put "them on their guard, and prevent them from being drawn "into law suits without their own *express direction*." It would be well if these salutary observations were enforced by modern positive enactment; for unquestionably numerous instances daily occur of a client having merely intended at most to authorize an attorney to write letters for debts, when perhaps in a few weeks afterwards he finds to his surprise that his communication has been stretched into an authority to prosecute actions which are then even ripe for trial, against parties who turn out to have become insolvent, and then some clerk or clerks will swear to frequent calls in his principal's office, or even to *an express* verbal authority to sue. Unless the attorney or solicitor for a *claimant* stands above suspicion, he should have a *written* authority, qualified according to the deliberate intention of the party, as "to demand payment of the debt," "to "take an opinion," "to issue a writ and declare only," particularly guarding against any unlimited authority without further communication. So on behalf of a *defendant*, the retainer should be in writing, as "to tender £——," "to put in and "justify bail," "to pay £—— into court," "to defend until notice of trial, but no further without fresh instructions." By this means a party might protect himself from being plunged precipitately, or carried on through all difficulties into

(*d*) *Owen* v. *Ord*, 3 Car. & P. 349; *Gill* v. *Lougher*, 1 Tyrw. 121; *Anderson* v. *Watson*, 3 Car. & P. 214; *Dupin* v. *Keeley*, 4 Car. & P. 102; and Newl. Ch. Pr. 59.

(*e*) See Cases Chit. Eq. Dig., Solicitor and Client; and *Wright* v. *Castle*, 3 Mer. 12, that a *special* authority to sue is essential, though not to *defend*.

(*f*) See *Owen* v. *Ord*, 3 Car. & P. 349.

CHAP. XI. RETAINER OF A LEGAL AGENT.

expensive litigation. (g) When an attorney or solicitor is retained by assignees of a bankrupt or insolvent or trustees, it is then still more essential to obtain the signatures of all his employers; and if the authority is to be from assignees of a bankrupt to institute a suit in equity or to compound or submit disputes to arbitration, it is the duty of their solicitor first to convene a meeting of the creditors, and obtain the consent of the major part in value, as directed by the Bankrupt Act; (h) and the Insolvent Act implies the same proceeding. (i)

Stipulation that due care has been observed in ascertaining a title.

Supposing an attorney to have accepted a retainer and to have conducted an intended purchase up to the instant before payment of the purchase money, it would be expedient for the client to obtain from his attorney, even upon payment of a small sum, a formal written guarantee that he has used due care in investigating the title, with an engagement duly framed, that if it should turn out otherwise, he will make satisfaction upon the discovery of the defect; by which means the too frequent loss of remedy against the attorney by the bar of the statute of limitations would be avoided, as the statute would then not run against the engagement until the discovery. (k)

Attorney or solicitor not to disclose his client's communications.

Another suggestion may be important, as sometimes essential to justice, viz. that an attorney or solicitor cannot be *compelled*, nor indeed is *at liberty* to communicate any deeds or facts, the existence of which were merely told to him professionally by

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(g) The following forms of retainer may be readily varied according to each particular case.

by a claimant or plaintiff, of an attorney to sue.

I, *A. B.* of, &c. do hereby retain Mr. *C. F.* of, &c. as my attorney, to [commence and prosecute an action in the Court of ——, against ——, of, &c. for the recovery of the sum of £. 100. and upwards, which I claim to be due from him to me, as appears per annexed [*or* " subscribed particulars."] Dated this —— day of ——, A. D. ——.

Signed by the said *A. B.* in my presence, after he had read the same the day above mentioned. } *L. M.* Witness — *A. B.* (L. S.)

In the Court of K. B. [C. P. or Exchequer.] — Between { *A. B.*, Plaintiff, and *C. D.*, Defendant.

Form of a retainer to be signed by a defendant in an action.

I, *C. D.* of, &c. the above named defendant, do hereby retain and employ Mr. ——, of, &c. as my attorney, to [defend the above action commenced against me by *A B.*] Dated this —— day of ——, A. D. 1834.

Witness to the signature of the said *C. D.*, after his having read the same in my presence the day aforesaid. } *N. O.* Witness. — *C. D.*

(h) 6 Geo. 4, c. 16, s. 88; 2 Young & Jerv. 475; 3 Young. & Jerv. 373.

(i) 7 Geo. 4, c. 57. s. 24; 3 Bing. 203, 370; 10 Moore, 7; and Chitty's Col. Stat 596, note (e).

(k) *Short* v. *M'Carthy*, 3 Bar. & Ald. 626; *Brown* v. *Howard*, 2 Brod. & Bing. 73; *Howell* v. *Young*, 5 Bar. & Cres. 259.

CHAP. XI. RETAINER OF A LEGAL AGENT.

his client, (*l*) though as to *acts* done in his presence, as the execution of deeds, &c., there is no such privilege; (*m*) and therefore when it is important for any just purpose to execute a deed or other transaction, and yet to conceal the same, it should be effected in the absence of the solicitor, though his client might afterwards confidentially inform him of the fact. In one case, Lord Tenterden held that such privileged professional confidence is to be confined only to communications relating to some *action* or *suit*. (*n*) But other preferable decisions establish that the rule is not thus limited, but extends to all questions put by a client, as relating to the probable effects of a fraudulent deed, and to all his communications connected with or having reference to his professional character; so that now a client may safely communicate every fact, and hold every description of conversation with his attorney or solicitor, or even the clerks of either, and they will not be allowed to divulge the same. (*o*) But where two persons in dispute employ the same attorney, the communication made by either of them may be used by the other, if at the time such communication was made it was intended by the party making it to be communicated to the other party. (*p*)

Duty of attorney, solicitor, or proctor, to ascertain the facts and the proof thereof, and law, before commencing or defending any proceedings.

It is scarcely necessary to observe, that every prudent attorney or solicitor, except in the clearest cases, where the precise evidence has been previously ascertained, should before he *commences* or *defends* any proceeding, be well assured that *sufficient evidence can be adduced;* and if his client be either too sanguine or hasty, it will be advisable to incur the expence in the first instance of examining at least one or two of the principal witnesses, and that *in the absence of the client*, who is too apt to suggest facts to the witnesses, and who may too readily assent and thereby mislead. By this precaution a double advantage may be acquired, that of not only obtaining an accurate view of the facts, but also of eliciting evidence before the opponent and his witnesses have become cautious and guarded. (*q*) Lord Tenterden, we have seen, observed "that an attorney "who allows his client to proceed without pointing out to him "the expediency of ascertaining the evidence, and that in the "very *first instance*, and well considering the probable result,

(*l*) *Stratford* v. *Hogan*, 2 Ball. & B. 164. In one instance, however, a solicitor was ordered to be examined against his client in a case of fraud; *Couts* v. *Pickering*, 3 C. R. 66.

(*m*) *Sanford* v. *Remington*, 2 Ves. J. 189.

(*n*) *Williams* v. *Mudie*, 1 Car. & P. 158; *Broad* v. *Mead*, 3 Car. & P. 518.

(*o*) *Cromack* v. *Heathcote*, 2 Brod. & Bing. 4; *Doe* v. *Harris*, 5 Car. & P. 592.

(*p*) *Baugh* v. *Cradocke*, 1 Mood. & Rob. 183; and *Cleve* v. *Powell*, 1 Mood. & R. 228.

(*q*) *Ante*, 440, 1, 510. As to the *mode* of examining witnesses for this purpose, see *post*, "*Of preparing for Trial.*"

CHAP. XI. Retainer of a Legal Agent.

"is guilty of *grossly absurd and culpable negligence*." (*r*) We shall presently suggest *how* a case should be stated for the opinion of counsel, and how particular and precise an opinion should be required; by which means disastrous defeats would frequently be avoided. (*s*)

Duty to state a case, and how; and to obtain what opinion.

If the law applicable to the facts should be at all questionable in the judgment of the attorney, then he should suggest to his client the expediency of taking an opinion of counsel, and obtain his authority for that purpose; and which *case, when properly framed*, with an *explicit* opinion of an experienced counsel favourable to the subsequent proceeding, will in general afford protection to the *attorney* for any misapprehension on the advised right of the party; (*t*) and sometimes, probably in case of arrest which turns out ill-advised in point of law, by such opinion having been taken, a jury may be induced to moderate the damages, although the same would not, of itself, afford a legal bar to the action, because an *arrest* is not essential to the trial of a right. (*u*) But a case stated in a *hurried manner*, without a *full and accurate disclosure* of all the facts, and without being well assured by the attorney's own examination that there is *legal* evidence to prove the facts, or a case stated so generally, and without sufficient specific separate questions so as to draw the *attention of counsel* to the important points, and to answer each in particular, will form no such protection; but on the contrary, may induce suspicion that for the sake of having a suit or defence to conduct, the attorney has carelessly or even purposely neglected to raise the material points. And if in consulting a counsel upon an abstract, a solicitor should take upon himself to draw a conclusion from deeds, and do not lay the deeds and the whole of the facts before the counsel, and should err in such conclusion, a jury might find a verdict against him for his negligence (*v*). If the opinion of counsel should be doubtful or ambiguous, it would then be proper to state a *further case*, or to see the counsel in consultation, until such an *explicit*

(*r*) *Ante*, 1 Vol. 440, note (*k*); and certainly, when it is considered that by the very small expense of a fee to counsel in the *first instance*, for an opinion, a disastrous result at the *conclusion* of a cause occasioning very large expence, might be saved, the omission seems inexcusable.

(*s*) See *infra*, and *post*, 42, 3.

(*t*) *Kemp* v. *Burt and another*, 1 Neville & Manning's Rep. 262, *post*. 32, 42, 3.

(*u*) *Ravengar* v. *M'Intosh*, 2 Bar. & C. 693; 4 Dowl. & Ry. 187; S. C. *Bristow* v. *Heywood*, 1 Stark. R. 48; *Godefroy* v. *Jay*, 1 Moore & P. 236; 6 Bing. 616.

(*v*) 3 B. & Cres. 799; 5 D. & R. 587, S. C. So if an attorney take too short an abstract of a will, and omit a material qualification of a bequest, and any consequent damage arise, he may be sued, 3 Stark. R. 154; 1 D. & R. 30, S. C.

CHAP. XI. Retainer of a Legal Agent.

answer in writing has been obtained to a written statement as will unquestionably sanction the attorney in his subsequent proceedings; and still if there should be any doubt upon the result, the client should in the presence of a respectable and disinterested third person, be requested deliberately to read the statement and opinion, and then in writing reciting that a case has been stated and opinion obtained, direct precisely what shall be done. This was stated to be the duty of an attorney by Lord Tenterden, and also accords with the opinion of one of the most eminent conveyancers and equity counsel of the present day, as regards the duty of an attorney, in taking an opinion upon a title or upon the expediency of a Chancery suit. An opinion of counsel upon an imperfectly stated case will very frequently mislead, although such opinion might be perfectly correct in itself.

As regards this part of the duty of professional men, the observations of Lord Stowell are strongly in point, especially when the suit or proceeding is on behalf of illiterate or ill informed persons. "The proctor has in these cases something of a public "as well as a private duty thrown upon him, something that in "such cases he owes to the fair administration of justice as well "as to the private interests of his employers. The interests "propounded for them *ought in the proctor's own apprehension* "*to be just, or at least fairly disputable;* and when such inter- "ests are propounded, they are not to be pursued *per fas et* "*nefas.*" (v)

When it is the duty of the principal attorney or solicitor *himself* to conduct the proceeding, and not to delegate to a clerk.

Another hint may be useful, as well to clients as to professional practitioners, namely, to have it understood and expressly stipulated, that *matters of importance*, and especially of *negociation*, where the skill and experience of a principal attorney may be most important for success, that such *principal* attorney should *himself* conduct the whole or a certain part of the proceeding, and not hand it over to a clerk or third person to transact, as is too frequently, and culpably the case, and by which an otherwise successful result may be marred. Indeed, without any such stipulation, it appears from the observations of Lord Stowell upon the duty of a proctor, to be the duty of the principal attorney or solicitor himself so to act; for his lordship said, "I adhere to the opinion I have ex- "pressed, that where an intercourse for such a purpose as the "definitive settlement of a claim is to take place, it is most "effectually conducted by the proctors *themselves*, and not by

(v) *Case of the ship Fredrick*, 1 Haggard's, R. 222.

CHAP. XI. Retainer of a Legal Agent.

" their clerks; they have both a personal and legal weight, and " an authority that can better support them against over- " weening pretensions; and there is a direct responsibility " belonging to them highly proper to intervene in any point so " extremely important as the proposed final adjustment of a " cause;" and in that case he made the proctor pay all the costs, in consequence of his neglect of duty in that and other respects. (*w*)

Conduct of an attorney, solicitor or proctor, with respect to *negociations*.

In negociations between solicitors of known integrity and honour, there will be no danger from an interchange of candour and liberality; but, unhappily, there is too frequently great risk of the want of reciprocity in candour; and, consequently, unless the honour of the opponent be well known, no communication of facts should be made that could be ungenerously taken advantage of injuriously to the client, even though expressed to be made without prejudice; (*x*) but, on the other hand, we have an excellent practical lesson from the same great judge, Lord Stowell, upon ethics and moral conduct to be observed by all practitioners, or they may themselves personally suffer from a deviation; namely, "That not only is a practitioner " bound *not* to stifle evidence or to instruct witnesses when " examined not to commit themselves, or in other words not to " tell the whole truth. But, moreover, that where a meeting " is professedly held for amicable arrangement, and the parties " are personally produced for the purpose of fair agreement and " to prevent litigation, it is contrary to the purpose of such a " meeting to resist fair disclosure of all facts leading to a just " conclusion, or to suppress facts without a knowledge of which " real justice is unattainable; for men ought not to come to " such a meeting as to a catching bargain, but in the full spirit " of equitable adjustment;" and as the proctor in that case had violated that rule of professional conduct, Lord Stowell decreed that he should pay all the costs. (*y*)

Other duties: as his duty to

Another important duty of every solicitor as regards every

(*w*) The *Frederick*, 1 Haggard. Rep. 220.

(*x*) A communication "*without prejudice*," although not strictly admissible in evidence, will nevertheless sometimes be taken advantage of, and indeed sometimes justly so; and therefore a cautious solicitor should abstain from communicating any important information, even with that guard. It is well known that a young attorney had to pay heavy damages for the breach of promise of marriage, although all his love letters and promises were, as he thought, very cautiously concluded "*This, without prejudice*, from yours ever faithfully, *C. D.*" The judge, facetiously, left it to the jury whether those concluding words, being from an attorney, did not mean that *he* did not intend any prejudice to the lady, and the jury found accordingly.

(*y*) *The Frederick*, 1 Haggard. Rep. 223, 4.

description of business is, that as soon as he has prevailed on another party to enter into any arrangement beneficial to his client, *he should instantly on the spot*, reduce into the form of a short but proper preliminary agreement, if he have not (as is advisable) already a proper form prepared, (z) and have it signed, least upon further consideration, the other party should, although dishonourably, attempt to fly from his engagement, and insist on terms more favourable to himself. (*a*)

CHAP. XI. RETAINER OF A LEGAL AGENT.

secure a binding written engagement, or security for his client.

Amongst other devices to increase expences, and acquire additional profits by unjust means, no expedient has been more successful amongst a few disreputable individuals than splitting what might have been effected in one entire loan, into several transactions, and causing several mortgages or several grants of annuity with several deeds, to be executed. The numerous reported decisions under the Annuity Act, evince how often, in answer to an application for an advance of one, two, three, or more thousand pounds, the answer is, I have no one client who can advance that sum, but I have four or five who will advance about 1000*l.* each; but then he will have a separate security for himself; and accordingly the entire sum will be advanced on one, two, three, or more sets of deeds, with a repetition of charges for attendance, &c., as if the transactions had been entirely distinct; (*b*) and although in these cases sometimes the Court will set aside the warrant of attorney, especially where the grantee is contaminated in the transaction; yet, even then he may in general recover back the principal sum, and interest at the rate of 5*l.* per cent.; so that he sustains in effect no loss in consequence of his attempt to impose hard terms, excepting that he may have to pay the costs of the motion.

Impropriety of increasing expenses by any

Perhaps next to the duty to take due care that the principal proceeding and the steps depending thereon shall be *accurately* taken, *Expedition* is of paramount importance. The legislature and the courts are constantly striving to perfect that object; but such endeavours are sometimes counteracted by attornies in low practice; so that under the pretence of courtesy to the opposite attorney or his client (but which ought never to be shewn to the injury of the employer), or on some

Duty to expedite.

(z) It would be found advantageous for solicitors to have ready prepared, with blanks for names, &c., every description of agreement relating to ordinary bargains, especially those relating to leases, and so full in the stipulations as to require reduction rather than enlargement.

(*a*) *Ante*, 1st Part, 294, note (*b*), and 2nd Part, 472, 3.

(*b*) 1 Bing. 234; 8 Moore, 109; S. C. 4 Bing. 26.

CHAP. XI. RETAINER OF A LEGAL AGENT.

other flimsy ground, some causes are not brought to a termination as soon as they ought; and the consequence is, not merely the increase of fees, for successive refreshers, term fees, &c., but it too frequently occurs, especially in Courts of Equity (where the parties are often numerous,) that pending the delay, by intervening marriages, births, deaths, bankruptcies, insolvencies, and different other events, it becomes necessary to revive the suit and introduce fresh parties, and so that not unfrequently a final decision is not obtained until the second or third generation after the death of the party who originated the suit. *That* solicitor, whose practice first puts his client in possession of the fruits of the proceeding, is obviously to be preferred, whilst the tardy solicitor is as injurious to his client, as to his profession, who are by the vulgar indiscriminately calumniated as well as the law itself, in consequence of such misconduct of a few inferior individuals. (*b*) Moreover, as soon as the proceeds have been recovered, the attorney should immediately hand over the amount to his client, or at least the balance, after deducting his own reasonable fees; a just proceeding, which will always insure the approbation and recommendation of the client.

Stipulations for remuneration out of the usual course, illegal.

In general respectable attornies or solicitors make no express stipulation with their clients relative to remuneration; and at most, when the client's circumstances and the result are doubtful, and the proceeding is expected to be expensive, he will require an advance to cover expenses, and which he is entitled to demand, (*c*) or the guarantee of a third person, which

(*b*) Too many instances of this culpable indolence, or, it is to be feared, want of principle, have occurred: one is well known and authenticated. An attorney, on the marriage of his son, gave him 500*l.*, and handed him over a chancery suit, with some common law actions. About two years after the son asked his father for more business. *Father*: Why I gave you that capital chancery suit and the actions, and I hear you have got a great many new clients; what more can you want? *Son*: Yes, father, but I have *wound up* the Chancery suit and given my client great satisfaction, and he is in possession of the estate. Father: What! you improvident fool! *that suit was in my family for twenty-five years*, and would have continued so as much longer if I had kept it; I shall not encourage such a fellow. *Sequel*: The father died a few years after, comparatively poor, having worn out nearly all his clients, and being despised by every one; the son honourably conducted his practice for *fifteen years*, and has now retired, residing upon his purchased estate respected and esteemed by all. If a *physician* were detected in purposely prescribing injurious or *inefficacious* medicine, in order to protract his patient's illness, and to obtain an accumulation of fees, what would be the deserved censure of mankind! and yet he might perhaps better excuse *himself* than the lawyer, on the ground that the illness was occasioned by the profligacy or intemperance of the patient, and that his suffering for a time might teach him future temperance, besides benefiting the profession.

(*c*) Per Bayley, J. in *Wadsworth* v. *Marshal*, Exch. 2d June. A.D. 1832, MSS. It was his opinion that an attorney was entitled to insist that he should be supplied with the money necessary to carry the cause to trial, not only to the amount out of pocket, but the other expences. And see *Hoby* v. *Built*, 3 Bar. & Adol. 350; *Rowson* v. *Earl*, 1 Mood.

should be in writing, expressing the consideration, and properly framed. (*d*) But an attorney cannot legally take a prospective *mortgage* as a security for *future* costs. (*e*) In order to secure confidence and despatch, the client should spontaneously offer an advance of money, or such guarantee, when he apprehends that the attorney would prefer having the same. Any arrangement respecting the remuneration for trouble and expences, when there is mutual confidence, usually waits till the completion of the suit or other business, although the better opinion is, that an attorney may refuse to proceed without advance of cash, provided he give due notice of his requiring the same. (*f*) At all events, at the termination of the suit, the fees and costs should (unless to be paid by the opponent,) be promptly and readily paid by the employer, except there has been such gross negligence or misconduct, as to have been prejudicial to the full extent of the claimed costs, (*g*) or the charges be for unnecessary and useless business, (*h*) or excessive. In the latter case, if there be any *taxable* claims or charges for business done in a suit, the bill must be delivered a month before the commencement of any action to recover such fees, and pending that month, or at any time after, before the commencement of an action, the bill may be taxed; (*i*) or if not taxable, an adequate tender should be made.

Any stipulations by the attorney, that his remuneration shall depend on the event of the cause, would before the recent act have rendered him an incompetent witness in support of the proceeding. (*k*) And no attorney or solicitor can legally or effectually stipulate to have part of the estate or money to be recovered, in lieu of ordinary costs, as that would amount to the offence of *champerty*, and, perhaps, induce the Court to strike him off the rolls. (*l*) Nor is it legal for a plaintiff's attorney to

& Mal. 538, overruling Sayer 173, and other cases in Tidd's Practice, 9th edit. 86, 87. The cases in *Equity*, 14 Ves. 196, 271; 1 Swans. 1; 3 Swans. 93, seem to establish that a solicitor must proceed without funds; but *semble*, it would now be ruled otherwise.

(*d*) *Barker* v. *Fox*, 1 Stark. Rep. 276; *Hollings* v. *Gregory*, 1 Car. & P. 627.

(*e*) See several cases, Chit. Eq. Dig. tit. Solicitor and Client, IV; and even as to *antecedent* costs, a mortgage is not conclusive, nor prevents taxation. 3 Young & Jer. 230.

(*f*) *Hoby* v. *Built*, 3 Bar. & Adolp. 350; *Wadsworth* v. *Marshall*, 2 June, 1832, MSS., *ante*, 26, n. (*c*); *Rowson* v. *Earl*, 1 Mood. & Mal. 538.

(*g*) *Hill* v. *Featherstonhaugh*, 7 Bing. 569; *Templar* v. *M'Lachlan*, 2 Bos. & Pul. New Rep. 136.

(*h*) *Hill* v. *Featherstonhaugh*, 7 Bing. 569.

(*i*) 2 Geo. 2. c. 23, s. 23, and the recent clear decision that the same extends to all business at law or in equity transacted even in a county court, or upon a plaint as replevin, and is not confined to the superior courts or courts of record. *Wardle* v. *Nicholson*, 1 Nev. & Man. Rep. 353.

(*k*) 3 & 4 W. 4. c. 42, s. 26.

(*l*) As to *Champerty* and *Maintenance*, see 4 Bla. Com. 134, 5; *Penn's case*, 2

CHAP. XI. RETAINER OF A LEGAL AGENT.

stipulate to receive a large sum, as one hundred guineas, besides taxed costs, in case he should recover, and no costs in case his client should fail.(m) Indeed any stipulation out of the usual course of fair remuneration, or even an apparent gift by a client to an attorney pending a suit, is illegal and void; or at least, may in general be set aside in a Court of Equity. (n).

Construction of 2 G. 2, c. 23. s. 23, as to the necessity for a month's delivery of a bill of costs (o)

It has been observed, that the statute 2 Geo. 2, c. 23, s. 23, requiring the delivery of a bill "for any *fees, charges*, or *dis-* "*bursements* at *Law* or *in Equity* a month before action "thereon, in order that the same may be taxed," ought to be construed liberally; and Lord Eldon said, "Nothing ought to be "guarded with so much jealousy as the right of suitors to have "their bills of costs taxed;" (p) and Tindal, C. J., said, "that "as the Act is remedial, it is better to draw in a case on the "extreme verge than to leave it without;" (q) for the suitors cannot themselves know the value of the services of their attornies; and therefore to prevent extortion, the bill of the attorney is required in one case as well as in another to be referred to a competent judge. (r) Accordingly, in a recent case, it was decided that the Act extends to business done as well in *Courts not of Record* (as the *County Court*), as in the Courts of Record; (s) and that as a replevin bond is properly preceded by a plaint in the County Court, which is the commencement of a replevin suit, the preparing and attesting the execution of such bond was a taxable item; and that although no bill had been delivered, the attorney could not *sever* his claim for money advanced in *connection* with *that proceeding*, and recover money disbursed by him *professionally* in relation to such bond or other proceedings in replevin. (s) So business done by an attorney of one of the Superior Courts, in the *Insolvent Court*,

Inst. 564; *Kenney* v. *Brown*, 3 Ridg. P. C. 502; *Stanley* v. *Jones*, 7 Bing. 369; *Marquis Cholmondeley* v. *Clinton*, 2 Jac. & W. 136; *Guy* v. *Gower*, 2 Marsh, R. 273; *Stone* v. *Yea*, Jacob's R. 426; and see several cases, Chit. Eq. Digest, tit. Barrister, and tit. Solicitor and Client, IV.

(m) *Guy* v. *Gower*, 2 Marsh. Rep. 273. Perhaps a power, by leave of a judge, to permit an attorney to stipulate for larger remuneration in difficult and doubtful cases, might safely be introduced; such a stipulation would prevent those hard bargains which are secretly made in consequence of the risk incurred, and constitute a protection to needy persons, who have claims which they wish to assert, and yet are not so impoverished as to be able to sue *in forma pauperis*. Such a power might be so qualified as to prevent any risk of maintenance or champerty.

(n) See *Montesquieu* v. *Sandys*, 18 Ves. 302; and *Wood* v. *Downes*, 18 Ves. 120; *Wright* v. *Proud*, 13 Ves. 138; and other cases in Chit. Eq. Dig. tit. Solicitor and Client, IV. and the principle of the recent decision in *Popham* v. *Brooke*, 5 Russell Rep. 8.

(o) And see fully, Tidd 9th ed. 325 to 341; and Chitty's. Coll. Stat. tit. Attornies.

(p) *Bulme* v. *Power*, 1 Jacob. 307.

(q) *Smith* v. *Taylor*, 7 Bing. 259; 6 Moore & P. 66.

(r) In argument in *Wardle* v. *Nicholson*, 1 Nev. & Man. 362.

(s) *Wardle* v. *Nicholson*, 1 Nev. & Man. 355. The case of *Reynell* v.

in procuring an insolvent's discharge, is a proceeding *at law* within the meaning of the Act; (*t*) and business done under a commission of *Lunacy*, is taxable before a Master in Chancery. (*u*) It should seem, however, that it was considered in the above recent case, that there must have been some item either actually constituting the *commencement* of some proceeding in a *Court* of Law or Equity, or in some other *legal proceeding*, such as a commission or fiat in bankruptcy, or *pending* the same; (*v*) or at least some formal step *perfected*, or at least *prepared*, immediately antecedent to such proceeding, and essential for conducting the same. A charge for drawing and engrossing an affidavit to hold to bail, (*x*) or for preparing a warrant of attorney that was executed, (*y*) or even though it were not executed, (*z*) and a charge for a *dedimus potestatem* to take the acknowledgment of a fine, (*a*) and for attending at a lock up house and filling up a bail bond and obtaining the defendant's release, (*b*) and a mere charge for attending and advising a party in a suit, though no actual business had been done by the attorney, (*c*) and an item for business done under an extent, (*d*) have been holden taxable items. And though in one case it appears to have been considered that the drawing an affidavit of debt and bond to the Chancellor for the purpose of obtaining a commission of bankrupt, were not taxable items, it has been observed that there the affidavit had not been sworn, nor the commission issued; and that case seems to have been virtually overruled by others. (*e*)

What charges not within the act.

But business *unconnected* with any suit or business at law or in equity, is not within the act; and, therefore, it has been held that charges in a bill for *searching* to see whether satisfaction of a judgment had been entered, or whether an issue had been entered and docketed; (*f*) and a charge for attending upon and concerting measures with the attorney of the oppos-

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Smith, 2 B. & Adol. 469, only applied to the statute 3 Jac. 1, c. 7, s. 1, and was an action by one attorney against *another attorney*. This case seems to overrule *Beck* v. *Wells*, 1 Cromp. & M. 75, A. D. 1832, as to business in a Court of Requests.

(*t*) *Smith* v. *Wattleworth*, 1 Car. & P. 615; 4 Bar. & Cres. 364; 6 D. & R. 510, S. C.

(*u*) *Jones* v. *Bywater*, 2 Cromp. & J. 371.

(*v*) *Id. ibid. Smith* v. *Taylor*, 7 Bing. 259; sed Alderson, J. diss.

(*x*) *Winter* v. *Payne*, 6 Term. R. 625.

(*y*) *Sandom* v. *Bourn*, 4 Camp. 68.

(*z*) *Weld* v. *Crawford*, 2 Stark, R. 538.

(*a*) *Ex parte Pricket*, cited 1 Nev. & Man. 362.

(*b*) 6 Bar. & Cres. 86.

(*c*) *Smith* v. *Taylor*, 7 Bing. 259; 1 Dowl. Pr. C. 212, S. C.; sed. Alderson, J. diss.

(*d*) *Rex* v. *Collingridge*, 3 Price, 280.

(*e*) *Burton* v. *Chatterton*, 3 Bar. & Ald. 486, observed upon in *Wardle* v. *Nicholson*, 1 Nev. & Man. 355.

(*f*) *Fenton* v. *Correia*, 4 Ry. & M. R. 262; 2 Car. & P. 45, S. C.

CHAP. XI. Retainer of a Legal Agent.

ing creditor to resist the discharge of an insolvent, are not within the act. (*g*) And where an attorney had been obliged to pay money in consequence of his undertaking to pay the debt and costs, this was holden not to be a *disbursement* by him, as an *attorney*, within the meaning of the statute, (*h*) and not to be taxable. And a bill for proceedings in *bankruptcy* is not within this act, nor is it requisite that such a bill should be taxed under the 6 Geo. 4, c. 16, sect. 14, before the commencement of an action, although a charge for *obtaining* a *certificate* would be otherwise. (*i*)

When illiberal to tax.

When an attorney has conducted the proceedings faithfully and zealously to a conclusion, whether fortunately or disastrous, it would be illiberal, if not ungrateful, to tax the same, unless the charges have been wholly unauthorized, or are exorbitant to a considerable amount; but, very discreditably to some opponent practitioners, they too frequently encourage, and even urge a taxation for that purpose, upon the most trifling objection. If the client should resolve to tax, he must, to avoid an action, take the proper proceedings, within the month, or he may within that time pay the amount, and afterwards obtain a taxation; and if the charge should turn out improper, the Court will oblige the attorney to refund; (*k*) but no *action* for the amount can then be sustained, for the remedy is in that case only by motion. (*l*)

When the delivery of a bill is unnecessary, and how then to proceed if it be unreasonable.

The statute 2 Geo. 2, c. 23, s. 23, in its terms extends only to "fees, charges, or disbursements at *law* or in *equity*," and these have unfortunately been construed to apply only to proceedings relating to some *suits* or proceeding in Court, and not to include charges for *conveyancing*, or otherwise not connected with a suit; (*m*) and yet it is in relation to charges of that nature that parties require most protection; because the proceedings in most suits are generally much the same, and the impropriety of the charges may, therefore, be readily detected; but in conveyancing, and charges for transacting the innumerable variations of business connected with the affairs of mankind, the assigning

(*g*) *Crowder* v. *Davies*, 3 Young & J. 433; but see *Smith* v. *Wattleworth*, 4 Bar. & C. 364, *ante*, 28, n. (*t*).

(*h*) 6 Taunt. 196; 1 Marsh. 539, S. C.

(*i*) *Taylor* v. *M'Gaugan*, 4 Car. & P. 96; and see *Crowder* v. *Duirs*, 3 Young & J. 33—433; *Hamilton* v. *Pitt*, 7 Bing. 223; but now see 1 & 2 W. 4. c. 56; Tidd, 9th edit. 331; 2 Taunt. 321; 1 Rose, 119, as establishing that an attorney's bill for obtaining a bankrupt's certificate must be signed and delivered a month before he can sue thereon.

(*k*) 2 Geo. 2, c. 23; *Williams* v. *Firth*, 1 Dougl. 198.

(*l*) *Gower* v. *Popkin*, 2 Stark. 85; Tidd. 9th ed. 333; but see *post*, 31, note (*p*).

(*m*) M. 12 G. 2; *Anon*, K. B. Barnes, 41, 2, C. P.; and see Bul. Ni. Pri. 145; Tidd's Prac. 9th edit. 328; *ante*, 28.

a just limit to the charges by the clients themselves would be difficult, if not impracticable. Abstracts, deeds, and agreements, may be unnecessarily long, and numerous attendances wholly unnecessary; and it would, therefore, be well if bills relating to such transactions were taxable precisely as the costs of suits. At present, the only protection against extortion is the probity of the solicitor, and the competition which it might be supposed would induce small charges, in order to obtain reputation for moderation, and thereby increase business; but instances frequently occur of advantage being taken of the solicitude of clients for dispatch, as in the instance of marriage settlements, or of their pressing occasions for money. In cases where excessive charges of this nature have been made, and the party is not anxious immediately to obtain the money or deeds, the only course is to *tender* in due form (*n*) a sum rather more than will assuredly be in the opinion of a jury sufficient to pay all reasonable charges; and then under the advice of counsel, to proceed on an action of detinue, when sustainable, for the deeds, or against the other party, or the solicitor specially, for not completing the transaction according to the previous contract, and for damages, if any, resulting from the delay. But it very frequently occurs that there is immediate occasion for certain detained deeds, or for the money. In these cases, the exorbitant demand may be paid under protest, and without prejudice to an action to try the propriety of the charges, and which, in some cases, may be sustained, notwithstanding the general rule, that money paid after knowledge or means of knowledge that it is not justly due, cannot be recovered back (*p*). If the money be urgently wanted, in general the solicitor for the lender or grantee of an annuity will detain or deduct the amount, and then the only remedy would be an action, which perhaps might be sustainable under special circumstances, although in general questionable, unless there has been a previous and well

(*n*) As to the form and requisites of a tender, see *ante*, 1 Vol. 506, 7, 8.

(*p*) See *Bilbee* v. *Lumley*, 2 East. 469. In one case a mortgagor having given due notice of his intention to pay off the mortgage, pursuant to the terms of the deed, the mortgagor and his solicitor, at the appointed time and place, tendered the principal and interest, and a sum for reasonable charges for reconveyance, &c. but the morgagee's solicitor insisted on being paid a further unreasonable sum of £50 for letters and attendance. The mortgagee having urgent occasion for the deeds, demanded them, and paid the full claim under protest, and afterwards proceeded in an action against the solicitor for the surplus of reasonable charges; and though it was urged that the action was not sustainable, because the full money had been paid with notice of the objection, and was therefore not recoverable back; Lord Tenterden held that the action was sustainable, as there was urgent occasion for the deeds, and the defendant's detaining them was a species of duress, like the decided case of the payment of an exorbitant sum in order to get back goods from a pawnee, and the plaintiff recovered; and see *Stone* v. *Lingwood*, Strang. Rep. 651.

CHAP. XI. RETAINER OF A LEGAL AGENT.

framed agreement to make the full advance. But, unfortunately, the difficulty and expense in recovering the money unjustly detained is so great that the party usually abandons the claim, and the pillage is perfected, and will continue to be repeated until the Legislature have subjected parties to a penalty, even for *asking* for more than is reasonable (*q*). The usury acts, 12 Ann, st. 2, c. 16, s. 2, prohibits solicitors and others from taking, directly or *indirectly*, more than at the rate of 5*s*. in the 100*l*. for procuring the loan of money, nor more than 12*d*. for making or renewing the security bond; and subjects each offender to indictment, and half a year's imprisonment, and to 20*l*. penalty (*r*); and the annuity act, 53 Geo. 3, c. 141, contains a similar clause against taking, directly or indirectly, more than 10*s*. per 100*l*. for procuring the loan. But these provisions are frequently *directly* violated, or indirectly so, by extravagant charges for the deeds, even where an attorney is himself the lender (*s*), and the payment of such charges is effected by the solicitor withholding the residue of the money. (*s*) In some cases, it has been held that such retention would invalidate the annuity (*t*); but in a subsequent case, the Court of King's Bench having taken from Easter Term till June 24, 1829, to consider the question, gave judgment, that the retention by the attorney of too large a sum for expenses was no ground for setting aside the annuity altogether, but that it should be referred to the master, to see what proportionable part of the annual sum should from time to time be deducted; so that according to the existing law, no immediate loss, penalty, or punishment accrues from such an attempted evasion of the statute; but the party is merely compelled to refund or allow the excess of reasonable fees, and perhaps pay the costs of the application (*u*).

Liabilities of attornies, &c.

Generally speaking, an attorney, solicitor, or proctor, is not liable for the consequences of his mistake upon a point of law, upon which a reasonable doubt might be entertained, and even judges differ in opinion (*v*); and although an attorney's taking an opinion of counsel, and acting under it, does not absolutely

(*q*) The Usury Act, 12 Ann, c. 16, and the Annuity Act, 53 Geo. 3, c. 141, contain clauses against solicitors exacting, *directly* or *indirectly*, a brokerage of more than 10*s*. per cent., and subject them to *indictment* for the violation, *Rex* v. *Gillham*, 6 T. R. 265; 1 Esp. R. 285.

(*r*) *The King* v. *Gillham*, 6 Term. R. 265.

(*s*) See cases, Chitty's Col. Stat. page 26, note (*o*).

(*t*) Under s. 6 of 53 Geo. 3, c. 141; 1 Bing. 234; 8 Moore, 109, S. C.; 4 Bing. 26; 6 Moore, 491; 6 Bar. & Cres. 165

(*u*) *Girdlestone's case*, K. B. 24 Jan. A. D. 1829.

(*v*) *Kemp* v. *Burt and another*, 1 Nev. & Man. Rep. 262. See numerous instances of varying opinions of the judges, Moody's Crown Cases, per tot., and *Selby* v. *Bardons*, 3 B. & Adol. 2, and *Wells* v. *Hopwood*, id. 20.

protect him, especially if the case were not diligently and properly stated; (*w*) yet it would be difficult to charge him with negligence where he, having *carefully* drawn a case, by fully stating the facts, evidence and points, with separate questions, and having obtained an *explicit opinion* of an experienced counsel, has acted strictly according to his directions (*x*). But an attorney is liable to be sued for any loss, damage, or delay, occasioned by his want of a due degree of knowledge, skill, or care, especially if the error be in his *practical department* (*y*); for although he might be excusable in coming to an erroneous conclusion upon points respecting the *substantial rights* of parties, it is incumbent upon him, at least, to be well informed, before he undertakes a suit or defence, of the proper *practical proceedings*, that being his more immediate department, and with respect to which he ought not even to have been admitted, if grossly deficient; and his obtaining his admission was in effect a legal fraud upon the judge. (*z*) As if a prisoner be superseded in consequence of the attorney not charging him in execution in due time (*a*). But, as above observed, if he mistake, even upon a point of practice, yet if it be a matter upon which a doubt could be reasonably entertained, he will not be liable (*b*). In cases of negligence of this description the Courts will not in general interfere summarily against the attorney, but will leave the party to his action; and in which the *jury* would have to decide upon the negligence, subject to the directions of the judge. (*c*) But when an attorney has been guilty of want of *integrity*, then, although no suit or proceeding has been pending, the Court will interfere summarily; and where an attorney assumed to act as a professional agent for parties abroad, and in consequence employed a proctor, and recovered prize monies and other proceeds for his employers, the Court summarily compelled him to account and pay over, although he had not done any act in Court in his professional character (*d*).

(*w*) *Godfrey* v. *Jay*, 1 Moore & P. 236; 6 Bing. 616. S C. See other cases, *ante*, 21, 22.

(*x*) See *ante*, 22.

(*y*) *Russell* v. *Palmer*, 2 Wils. 325; *Swannell* v. *Ellis*, 8 Moore, 340; 1 Bing. 347, S. C.

(*z*) *Per Cur.*, 6 Bing. 460, 468; *Reece* v. *Rigby*, 4 Bar. & Ald. 202; *Pitt* v. *Yalden*, 4 Burr. 2060.

(*a*) *Lee* v. *Ayrton*, Peake R. 119; *Russell* v. *Palmer*, 2 Wils. 325; 4 Burr. 2061; for neglecting to have a witness in court, and consequent nonsuit, *Reece* v. *Rigby*, 4 B. & Ald. 202; for not docketting a judgment; *Flower* v. *Bolingbroke*, 1 Stra. 639; for want of care in examining the sufficiency of a securit or title, *Brown* v. *Howard*, 4 J. B. Moore, 508; *Wilson* v. *Tucker*, 3 Stark. 154; *Ireson* v. *Pearman*, 3 B. & Cres. 799.

(*b*) *Ante*, 32, *Kemp* v. *Bent*, 1 Nev. & Man. 262; *Laidler* v. *Elliott*, 3 Bar. & Cres. 738; *Jacks* v. *Bell*, 3 Car. & P. 316; *Baikie* v. *Chandless*, 3 Camp. 617, 19.

(*c*) *Reece* v. *Rigby*, 4 B. & Ald. 202; *Bourne* v. *Diggles*, 2 Chitty's R. 311.

(*d*) *Re Woolf*, 2 Chit. Rep. 68; 4 Bar. & Ald. 77; *Ex parte Hall*, 7 Moore, 437; 1 Bing. 91, S. C.

CHAP. I. OF ATTORNEYS AND SOLICITORS.

III. OF PROCTORS.

Proctors stand in the same relation in Spiritual, Ecclesiastical, and Admiralty Courts, as attornies at *Law* and solicitors in *Equity*. They must before they can practise have served as a clerk for five years under articles, and which are liable to the same stamp duty, and to similar provisions as the articles of an attorney or solicitor. (*e*) They also must have been examined and admitted; and they must also obtain an annual certificate; (*f*) and they also are prohibited from suffering unqualified persons to use their names, (*g*) and from acting as a justice of the peace whilst they continue in practice. (*h*) Their general duties, rights, and privileges, stand on the same principles as those of attornies and solicitors; and we have seen some valuable observations of Lord Stowell upon parts of their duty and conduct. (*i*)

IV. OF CERTIFICATED CONVEYANCERS. (*k*)

Before the Act 44 Geo. 3, c. 98, sect. 14, there was no direct recognition of that description of legal agents, now called *Certificated Conveyancers*, and they seem to have been allowed to practise rather for revenue purposes than upon any principle of sound policy. Before that act, and indeed since, upon being entered and becoming a member of one of the Inns of Court, for which is to be paid 25*l*. (required by the subsequent Act, 55 Geo. 3, c. 184, schedule, tit. Admission and Certificate), and also upon paying for an annual certificate of 12*l*. or 8*l*. according to time and distance, any person, however insufficiently educated, and however ignorant of the legal profession, such as inferior schoolmasters and unadmitted or discarded lawyers, are allowed to draw conveyances and deeds, and other documents relating to real and personal estate, thereby interfering with the fair profits of regular practitioners, though ultimately by their blunders frequently occasioning a compensatory return of litigation. The first statute enacts, that any person who has not obtained the stamped certificate, as required by that act, and by the subsequent Stamp Act, 55 Geo. 3, c. 184, schedule tit. Certificate, and which must be impressed with the duty of 12*l*., if the party reside in London or Middlesex, or within the limits of the twopenny post office, or if elsewhere in England, 8*l*., and who shall for or in expectation of any fee,

(*e*) 55 Geo. 3, c. 181, Schedule, tit. Articles of Clerkship.
(*f*) 25 Geo. 3, c. 80, s. 11.
(*g*) 53 Geo. 3, c. 127, s. 8, 9.
(*h*) 5 Geo. 2, c. 18, s. 2.
(*i*) *Ante*, 23, 24.
(*k*) The following observations merely relate to those certificated conveyancers who have not been members of the profession, and duly educated as such, and do not apply to regular conveyancers, who are really learned in the law of *real* property.

CHAP. I. OF ATTORNEYS AND SOLICITORS.

gain, or reward, draw or prepare any *conveyance* or *deed* relating to any *real or personal estate*, or any proceedings in law or equity, pay a penalty of 50*l*. for each offence (unless he be a serjeant at law, or barrister, or a solicitor, attorney, proctor, agent, or procurator, having obtained a regular certificate, or a special pleader, draftsman in equity, *or conveyancer, being a member of one of the four Inns of Court*), and having obtained a stamped certificate as thereby required. But the act *exempts* persons solely employed to *engross* any deed, instrument, or other proceeding, not drawn by themselves, and for their own account; and also excepts public officers drawing or preparing official instruments, applicable to their respective offices, and in the course of their duty; and also excepts and authorizes *any* person drawing or preparing any *will, or any other testamentary papers*, or any *agreement not under seal*, or any *letter of attorney*.

The 55 Geo. 3, c. 184, schedule, title *Certificate*, by using the words "*being a member* of one of *the four Inns of Court*," impliedly introduced a wholesome restriction by requiring, not only the stamped certificate of 12*l*. or 8*l*., but also an *admission* by the benchers of one of those inns, at the cost of 25*l*. (*l*) For a time, the other fees paid by such certificated conveyancers to the respective inns, constituted a strong temptation to indiscriminate admission without sufficient enquiry. But, in consequence of improper persons having thus been enabled to practise, the benchers of the Inner Temple set the laudable example of instituting a rigid enquiry before they would admit. But still too many improper persons contrive to obtain admission and practise to a considerable extent, and a correspondent injury to more regular solicitors, who have paid the large duty on their articles, and probably paid for clerkship a considerable premium, and duly served under their articles for five years, and also occasioning material detriment to the community. (*m*)

It will be observed, however, that though the 44 Geo. 3, c. 98, extended only to *Conveyances* and *Deeds*, and those only when they related to personal or real estate, the 55 Geo. 3, c. 184, schedule, tit. Certificate, appears to extend further, to "*any instrument*," whether or not it be a deed, and to any deed or "*contract whatever*."

(*l*) See *Edgar* v. *Hunter*, Holt's Cases Ni. Pri. 528.

(*m*) Some of these certificated conveyancers, in league with inferior practitioners, besides causing innumerable blunders, and bad titles to estates, excite much unnecessary litigation amongst the lower orders of society.

CHAP. I. OF ATTORNEYS AND SOLICITORS.

It would seem necessarily to follow from these enactments, that when a certificated conveyancer has been duly licensed to act, and has acted within the scope of his authority, he may recover for his reasonable fees; and accordingly it has been so expressly decided (n); and a bill for mere conveyancing need not be delivered a month before the commencement of an action for the amount; (o) nor can it in general be taxed; (p) though if one bill has been delivered for costs in Court, and another for conveyancing, the Court may direct both to be taxed; (q) and if a bill has been delivered, partly for such costs, and partly for conveyancing, the whole may, as a matter of course, be taxed. (r)

V. OF NOTARIES.

Notaries also may be considered a description of law agent. Their department is of very ancient date, and existing in every state of Europe; and their acts have long, by common consent of merchants, and courts of all nations, had peculiar weight and respect attached to them. (s) A notary, before he can act must, by indentures of apprenticeship, have been bound to serve for the term of seven years as a clerk or apprentice to a duly admitted and practising public notary, or to a scrivener, who is also a notary by the custom of London (t); and such indenture must have been duly stamped as an indenture of apprenticeship (u); he must also have continued in *such* service, and be actually employed during the whole term; (v) and he must *bona fide* and exclusively serve such notary in his department; and therefore we have seen, that where the clerk had, during the mornings of his service, attended at a banker's, and only resorted to the notary's after five o'clock, the Court of King's Bench refused a mandamus to admit him to practise as a notary. (w) In order to be admitted to practice, a faculty is to be obtained from the Court of Faculties, (x) and upon which, when in England, a stamp duty of 30*l.* is imposed; (y) and if he be guilty of misconduct he may be struck off the Roll of Faculties, (z) and any un-

(n) *Poucher* v. *Normah*, 5 D. & R. 648.

(o) *Hooper* v. *Till*, 1 Dougl. 199: but semble, that a charge for *advising* relating to an *action*, may be considered as a taxable item. 7 Bing. 260; Alderson, dissentiente; *ante*, 29 note (c).

(p) Tidd. 9th ed. 328, cites 1 M. 12, G. 2; *Anon.* K. B., Barne, 41, C. P.; and see Bul. Ni. Pri. 145.

(q) Sayer, 233.

(r) *Hooper* v. *Till*, Dougl. 199.

(s) See in general Chitty on Bills of Exchange, Index, tit. Notaries; Burn. Eccles. Law, tit. Notaries.

(t) 41 Geo. 3, c. 79, s. 2; and see 44 Geo. 3, c. 98. s. 14.

(u) 55 Geo. 3, c. 184, Schedule, Apprenticeship.

(v) 41 Geo. 3, c. 79, s. 2, 7, and 8.

(w) *Ante*, 11 note (c). *Rex* v. *Scrivener's Company*, 10 Bar. & Cres. 511.

(x) Described by 41 Geo. 3, c. 79, s. 3, 4.

(y) 55 Geo. 3, c. 184.

(z) 41 Geo. 3, c. 79, s. 10.

CHAP. I. OF STUDENTS, SPECIAL PLEADERS, &c.

authorized person acting as a notary for profit, is subjected to a penalty of 50*l.*; (*a*) but Proctors and the Secretary to any Bishop, and certain other persons, are expressly excepted. (*b*)

The 1 & 2 Geo. 4. c. 48. s. 3, enacts that the above act, 41 Geo. 3. c. 79, shall not extend to Registrars or Solicitors of the Universities; and the recent act, 3 & 4 W. 4. c. 70, also exempts attornies and solicitors and proctors from the necessity of serving an apprenticeship to a notary, before they can act as such at any place distant from London *more* than ten miles, but then he must be admitted so to practise by the Court of Faculty. (*c*)

The 44 Geo. 3. c. 98, expressly excepts notaries; and consequently a notary may, for profit, draw or prepare any conveyance, deed, contract, or document whatever, although he is prohibited from being concerned for profit in any action or suit.

VI OF STUDENTS FOR THE BAR, SPECIAL PLEADERS, CONVEYANCERS, AND BARRISTERS.

With respect to students, special pleaders, conveyancers, and *barristers*, there is not at present any *statute* or *regulation* prescribing any precise course of study or *examination* as regards *legal* competency before he is admitted to practise, although there is a general *unqualified superintending control*, and final decision as to his general fitness to be called to the bar, reposed in the benchers of the Inn of Court of which he must have become a member by admission as a student. The absence of any regulation respecting the *legal* education, or requiring actual observance of any sedulous study, may be attributed to three circumstances; *first*, that many men are called to the bar merely for a collateral object, and not with any view to actual practice in the law, at least in England; *secondly*, from the supposition that as they would only be employed in practice through the intervention of an attorney or solicitor, their legal competency would probably be justly appreciated, and therefore, no unintelligent person would be prejudiced, as might occur in the employment of an ignorant attorney; and, *thirdly*, that men usually of more enlarged education, who have finished a college, or other superior scale of education, will naturally, of their own accord, in furtherance of their own ambitious views, take care so to qualify

(*a*) 41 Geo. 3, c. 79, s. 11. See exceptions and observations in *Candler* v. *Candler*, 1 Jacob. R. 231, 2.

(*b*) 41 Geo. 3, c. 79, s. 14.

(*c*) It has been complained that that Court demands 50*l.* on such admission, besides the stamp duty, which operates as an exclusion, contrary to the act.

CHAP. I. OF STUDENTS, SPECIAL PLEADERS, &c.

themselves as to merit professional approbation, and consequently to attain the profit and honors that may be expected to result.

The regulations, therefore, as concisely described by Mr. Tidd, have, until lately, merely required that before attempting to practise as a barrister, the party shall have been a member for a *certain term* of years of one of the four principal Inns of Court, *viz.* for *five years*, unless he has taken the degree of Master of Arts or Bachelor of Laws at one of the Universities of Oxford, Cambridge, or Dublin, in which case *three* years standing as a student will suffice. The stamps and fees of entrance vary but little in each Inn, but generally amount to about 30*l.*, of which 25*l.* is for the stamp, under the 55 Geo. 3, c. 184, schedule, Admission, and 1*l.* for the stamp on the bond executed by him as a student with his sureties, conditioned for the payment of all dues, and some other acts; and by a modern regulation, 100*l.* (*d*) must be deposited by a student at least twelve terms before he can practise even as a special pleader, unless a certificate be produced of his being a member of the College of Advocates, in Scotland, or a member of one of the Universities of Oxford, Cambridge, or Dublin; but which is returned or allowed to him on being called to the bar, after deducting expenses and arrears, if any, of duty; or, in case of death or quitting the profession, will, subject to just deductions, be returned. In each of the Inns of Court a student must also, in all cases, keep at least *twelve* terms; and for this purpose, to secure his appearance before the benchers, he must actually attend and dine in Commons, in the presence of the benchers, at least three days, at certain periods, in every term, before he can practise even as a special pleader; that is to say, two days in each of two separate half weeks in each term, and one day in the grand week of such term. (*e*)

These regulations, it will be observed, bring together in the respective halls of each Inn of Court, young men intending to be called to the bar during the law terms, although it might appear only for the purpose of dining there. Formerly there was provided some actual *legal* instruction, by the appointment of competent persons, termed *readers*; and we find, from Callis on Sewers, and other authorities, that students then received public instruction offered to them, although not perhaps compelled to attend. For some time, also, questions were propounded by the readers to the students, and they were compelled to answer them

(*d*) 51*l.*, part of this 100*l.*, is to pay the government stamps on admission to the bar.

(*e*) Tidd. 9th ed. 41, 42.

as exercises. But this practice fell into disuse; and in recent times instances have certainly occurred of assiduous students anxiously pressing for an examination and a hearing; but the pecuniary composition was preferred. This abandonment of the ancient system of lectures and of actual exercises was attributable, not to any want of anxiety on the part of the benchers to afford information to students, but from the want of any compulsory power to enforce attendance, and from the circumstance of students considering that *private* study of such a subject as law, is preferable to any *public lectures*, however ably prepared and delivered. It is certain, however, that students generally ceased to attend, and therefore the lectures were unavoidably suspended; at length, and recently, the benchers of the Inner Temple have introduced a rule instituting a strict examination of youths offering themselves *before they can be admitted even as students*, and subjecting them to other rules. As such examination takes place before any considerable progress can have been made in the study of law, they are of necessity confined to their *classical* attainments and education, and general fitness in respect of parentage and society, to be ultimately called to the bar. But although by this wholesome enquiry persons of too limited education, or objectionable habits, may be excluded or at least delayed; yet this is in the first instance, and before any considerable expence can have been incurred, or time lost in the study of the law; so that no injustice or hardship can ensue, as might be urged was the case when students were not examined in respect of their fitness by the benchers until at the *end* of five years, and then rejected.

Moreover, before a student can be called to the bar, he must, by the rules of most of the Inns of Court, produce a certificate of approbation, signed by one or more benchers, as well to be admitted as a student as to be proposed for the bar, and seconded by one or more of the benchers of his own inn; and without their consent he cannot be admitted, nor need the benchers, either collectively or individually, assign any reason for their refusal. So that, independently of any legal qualification, which is rarely much regarded by the benchers, any *ungentlemanlike* conduct, and still more any *moral delinquency*, would probably constitute an insuperable objection; because, as before suggested, it is of the utmost importance that in a society like that of barristers, who in general congregate and must be exposed to collision with each other, no objectionable individual should be admitted; and although there is in form an appeal to the twelve Judges, yet as in general two or three of them are benchers of the same inn,

CHAP. I. OF STUDENTS, SPECIAL PLEADERS, &c.

the appeal would be in substance *ab eodem ad eundem*, and no instance of a successful appeal can, it is believed, be adduced. (*f*) The consideration of these circumstances should deter parents and friends from attempting to introduce an ill educated or irregular youth into the higher departments of the profession, by which he would probably be exposed to much mortification, if not total disappointment.

At present, except from the regulation and examination in the Inner Temple, and from the known necessity for general propriety of conduct during the state of pupillage, so as not to offend decorum or otherwise induce the benchers to refuse admission to the bar, the principal benefit resulting from these institutions is the forming an *esprit de corps*, and advantageous association between the students, which enables them to compare each other's attainments, and sometimes, as North, in his life of Lord Keeper Guildford, recommends, exercise the *ars bablativa*, or legal discussion, which is certainly promoted by legal students at certain times of the year, resorting to the different inns of court, and naturally enquiring and arguing upon the subjects of their legal pursuits. (*g*) Ere long it may be hoped that public lectures for students at each of the inns of court will be revived, or rather again instituted, on an improved system, as laudably intended by the Law Institution as regards articled clerks. At the same time it will ever be found, that *substantial* knowledge of the law will be best attained by assiduous *private reading and research*, under the direction of an experienced barrister, special pleader, equity draftsman, or conveyancer.

In modern times *legal* knowledge has usually been attained by *private* study, assisted by two or three years sedulous pupillage in the chambers of a special pleader, equity draftsman, or conveyancer, from which, together with *private* lectures, a party, especially after a college or other scientific education, may obtain a just view of the points to be known, and the outline of practice. Sound, and accurate legal knowledge, and the power of ready reference to prior decisions (so essential to give legal weight and authority to all positions) can only be acquired by private, deliberate, and assiduous reading and study; *memory* depends principally upon *attention*, and the repeatedly taking a comparative view of the knowledge already acquired, so as to ascertain its accuracy: and strength of mind is not so much acquired by a continual and crowded accession of *new ideas*, as

(*f*) *Ante*, 3 & 4.

(*g*) See North's Life of Lord Keeper Guildford, 1 Vol. 20, &c.

by accurately comparing the relations of those ideas which we have already received. (*h*) The cause of failures at the Bar is principally *indolence*, and consequent *ignorance*, or at least want of readiness and ability to apply the small acquisition of knowledge; (*i*) and perhaps above all to the circumstance of young men having within these few years commenced practising for themselves long before they have become qualified (*k*).

Other attainments besides the law.

But let it be understood, that legal knowledge alone will not enable a barrister, in the present extended state of general education, to attain any eminence excepting perhaps merely for legal lore and chamber practice. He ought, before he even *commences* the study of the law, to have acquired a competent knowledge of physics, mathematics, mechanism, and even of the principal accomplishments and of general literature, since so much of the time of courts of justice is now and increasingly will be, occupied in discussing questions relating to patents, and every branch of arts and sciences. (*l*)

(*h*) See a full note on the study of the Law, 1 Bla. Com. by Chitty, 1 Vol. 29, 37, note 9.

(*i*) Men *talk* of *hard study*, but very few indeed read *well* for even *four* hours in the day; *six* hours really well employed might suffice.

(*k*) It has become the practice, almost without any previous study, to continue as a pupil in a pleader's or conveyancer's office for a very short time (perhaps scarcely a year) as if merely to obtain the reputation of having been there. When at least *two*, if not *three years* close attention to the practice, in the preceptor's chambers, is essential. It is really scarcely honourable to endanger the interests of clients by assuming to practise upon such very slender information, as of late has been customary. If this practice be attributable to the amiable desire of *sons* to relieve their parents from expence, the *latter* should take care to prevent the baneful influence of any such sentiment.

(*l*) See an interesting outline of the proper objects of an enlarged education, in Dr. Arnott's Elements of Physics or Natural Philosophy, General and Medical, 4th edition, Introd. *per tot*, and where he suggests the different departments of knowledge essential to be attained, and arranges them under four heads, and in the following order. A student for the law should, before he commences, consider whether he has acquired at least a general knowledge of all, or most of the enumerated sciences; and if not, then consult one or more eminent legal friends, which, if any, can be safely dispensed with, and complete his *previous* education accordingly; and when he has acquired the requisite general knowledge he may, upon commencing his legal career, ascertain upon which of the same subjects it will be advisable to *fill up* his leisure hours, which, particularly at first, he may subtract from legal study. But he must remember that the law is a jealous science, and requires, after a liberal education has been attained, almost exclusive attention at least for a few years:

1. *Physics.*

Mechanics,
Hydrostatics,
Hydraulics,
Pneumatics,
Acoustics,
Heat,
Optics,
Electricity,
Astronomy,
&c.

2. *Chemistry.*

Simple Substances.
Mineralogy,
Geology,
Pharmacy,
Brewing,
Dyeing,
Tanning,
&c.

CHAP. I. OF STUDENTS, SPECIAL PLEADERS, &c.

Information got up for the occasion, and not the result of an extended well informed mind, will ever be clumsy, and communicated with embarrassment, and lose its due effect with a jury; nor can there, without a *general* store of information, ever be distinguished ability or power in *reply*, (*m*) or of illustration in argument, or brilliancy of imagination, by which the accomplished advocate so frequently captivates and carries away a jury. Hence there should be no limit to the extended studies of a barrister (*m*).

The functions of special pleaders, equity draftsmen, conveyancers, and barristers.

The *professional* occupation of a *Special Pleader* is to give *verbal* or *written opinions* upon statements, which may also be verbal or written, and to draw *pleadings*, civil or criminal, and such *practical proceedings* as may be out of the usual course. The *Equity Draftsman* confines his attention to questions, pleadings and proceedings arising in equity. The *Conveyancer* advises upon titles and rights to property, whether personal or real, and he prepares, in cases of importance or difficulty, deeds, contracts, and wills, whether they relate to the person, or to personal or real property. The chamber practice of *Counsel* is the same as that of a pleader; but his principal and more lu-

3. *Life.*
Vegetable Physiology,
  Botany,
  Horticulture,
  Agriculture,
Animal Physiology,
  Zoology,
  Anatomy,
  Pathology,
  Medicine,
  &c.

4. *Mind.*
Intellect,
  Logic,
  Mathematics,
  &c.
Motives to action,
  Emotions and Passions,
  Morals,
  Government,
  Political Economy,
  Theology,
  Education.

I cannot refrain from adding two further suggestions, for the employment of leisure hours, and constituting parts of the above list of attainments; *First, to* study *Anatomy, Physiology, Pathology, Surgery, and Chemistry, and Medical Jurisprudence and Police.* I have, in order to assist in that department of reading, undertaken a work expressly for the purpose, entitled, "*Treatise on Medical Jurisprudence and* "*Police, &c.*" Those subjects are practically, intimately connected with *legal* proceedings, especially in the Criminal Courts. But, *secondly*, it will not suffice to study the above enumerated *sciences;* for all lawyers should study *mankind*, so as to be able to detect, under every semblance, the exact character of every individual with whom he is to have transactions in business. In this respect the Scotch education surpasses the English. It may not appear a very amiable department of *discernment* to pry into the characteristics of others, but it is especially essential for all whose avocation compels them to discriminate in their associations with mankind, and especially to elicit truth from witnesses. I trust I shall be understood to exclude so prying a habit from the social intercourse of friends and acquaintance.

(*m*) The ability of an advocate is more displayed in *reply*, whether upon law or fact, than in his original speech which might be laboriously prepared. In reply, he may evince a thorough comprehensive general knowledge of the subject, since he could not otherwise anticipate the new views and points that might be taken by his opponent, and which would embarrass or confuse an advocate if he be only capable of observing upon a very limited store of knowledge, whether of fact or law.

crative and pleasurable department is in Court, either in Bank or full Court, or at Nisi Prius, before a single judge and jury.

Opinions and their requisites.

With respect to *opinions*, some counsel scarcely do more than answer the question in the affirmative or negative, and sometimes only in the monosyllable "yes," or "no," without assigning any reason or referring to any authority; contending that the sanction of their general opinion only is required, and not an argument in support of it. (*n*) From such individuals, the authority for their assertion may stand so high as at least to sanction, or protect from censure, the solicitor who acts under it. But such an opinion can be of no other utility. The scientific mode of advising always observed by a counsel, who was justly celebrated for his superior learning, was the model which should be invariably adopted. (*o*) He always gave, as far as the state of the law would allow, ***First,*** a direct and *positive* opinion, meeting the very point and effect of the question; and separately, if the questions were properly divisible into several, so as to satisfy the object of the querist, and be intelligible to the meanest capacity. *Secondly,* he succinctly stated his several *reasons* in support of such opinion. *Thirdly,* he shortly referred to the statute, rule, and decisions upon the subject; and when advisable, as when they were of doubtful application, shewed in what respect they were analogous. *Fourthly,* if, from the nature of the case, the facts were obviously or probably susceptible of a small shade or difference in statement, which might have escaped the enquiry of the solicitor, and might lead to a different result, he would suggest the possibility of such variation, and how it might affect the result; so that the solicitor would necessarily perceive the necessity for stating a further case, or, which is frequently more useful, have a conference, which would lead to a more certain ascertainment of all the facts. By this means, in the earliest stage of litigation, and before any considerable expence had been incurred, the law and the facts were quite, or nearly as fully ascertained as upon the trial, and the result might be justly and correctly anticipated. *Fifthly,* when he was doubtful whether some important fact did not rest principally on the statement of the party interested, without having ascertained the evidence, he would suggest the necessity for enquiring in what way it was proposed to prove each fact. *Sixthly,* when he apprehended that the prefer-

(*n*) The late Sir Vicary Gibbs and Sir James Mansfield, celebrated for the number and accuracy of their opinions, usually wrote such concise opinions, and sometimes merely suggested, "as "the question is of considerable value, "it may be worth while to try it."

(*o*) Mr. Baron Bayley. N. B. The costs of taking an opinion on the case and evidence and of a consultation, are now allowed on taxation between party and party.

CHAP. I.
OF STUDENTS, SPECIAL PLEADERS, &c.

able process, or pleadings, might not be adopted by the attorney, or the special pleader, he would even suggest what course in that respect should be adopted. *Seventhly*, and lastly, if from the nature of the case, it occurred to him that some useful precautionary measures should be taken, he volunteered the proper suggestions. After such an opinion, attentively observed by a careful attorney, it was but rare that the client failed in his action or defence.

Pleadings.

With respect to *Pleadings*, a scientific pleader or advocate will not encumber the record with unnecessary statements, or complicated counts or pleas. The late Mr. Justice Dampier rarely suffered more than one count to be introduced into a declaration; but then he took care first well to ascertain the facts, and he already knew the law. Precedents should merely *assist*, and never govern; whilst now, too frequently, as many counts are inserted as any antecedent printed or manuscript precedent on the subject has ever contained: and if it be asked why there are so many, the observation will be, because if one should be objected to then the answer may be, there is another; and if that also be deficient, then that there is another, and so on until it is to be hoped that the Judge may be tired with the objections, and may say, Well, amongst so many I suppose there is probably one sufficient count, and therefore I will not nonsuit. But no one can contend that this is scientific pleading, or worthy of a liberal practitioner; as Dr. Johnson apologized for writing *a long* letter "because he had not time to write a short one—*i. e.* to consider and compress;" so the circumstance of a declaration or other pleading being very lengthy, in general indicates that it was framed hastily, or that the pleader had not sufficient knowledge of the law, or strength of mind, to enable and embolden him to compress. To these observations, however, there may be exceptions, where the facts or the law are so doubtful as in prudence to require *variations* in the modes of statement, so as to meet whatever may even possibly be the result; and where a particular Court, or even a single Judge, is known to entertain a peculiar opinion upon a point differing from others, the careful pleader should, to avoid even discussion, conform even to such erroneous impression upon such subject. (q)

(q) In a well known case it singularly so happened, that each of the four Judges of the Court of King's Bench differed from each other upon points of pleading. The discreet counsel anticipated the difficulty, and drew *four varying* counts, viz.; one to meet the opinion of each of the Judges; and, in consequence, they all concurred that upon the *whole* record, on one or other of the counts, the plaintiff was entitled to recover, although neither could concur upon which particular count.

It is grateful to the profession, and must be satisfactory to the public, to observe upon the present state of the former with regard to integrity and honor. *Formerly*, we had a celebrated lawyer, soon afterwards a Judge, unblushingly reporting of himself, as if it were matter upon which he plumed himself, that the Court had reproved him "for pleading subtly and deceptively, in order to trick the Court;" (*r*) and so late as A. D. 1761, we find an instance of such *malevolent* and *dishonorable feeling* in a barrister, evinced in causes in which he was personally interested, as his boasting that he had drawn the declaration in a lengthy and intricate way on purpose to *catch* the defendant, and to *scourge* him with *a rod of iron;* and that he had so improved the art of pleading that the paper book would amount to 3000 sheets, and he would ruin his opponent; and whereupon the Court directed the settling the issue in a quarter of a sheet of paper. (*s*) Happily no such degrading instances of contemptible conduct have in modern times occurred, (*t*) and the public will find the Bar universally as anxious for the improvement of the law, and the practice of it, as any suitor of the Courts; and even though the changes may demolish their respective incomes, yet they will still ever be found ready gratuitously, and even with increased zeal and energy, to advocate the claim of the poor or the oppressed.

(*r*) 1 Saunders Rep. 327 (*a*).

(*s*) *Yates* v. *Carlisle*, 1 Bla. R. 270.

(*t*) See ancient instances, Chitty's Eq. Dig tit. Barrister, p. 184; and see Harrison's Index, tit. Barrister.

CHAPTER II.

PROCEEDINGS BETWEEN THE RETAINER AND THE COMMENCEMENT OF LITIGATION.

1. Consideration who is the party legally injured, and modes of ascertaining the same - 47
2. Who the wrong doer, and modes of ascertaining the same - 48
3. What is the ground of complaint, and how to be ascertained - 52
4. What is the evidence of cause of action, and of ascertaining the same - - - 53
5. Of bills of discovery in general - 54
6. Demand of proper security, in lieu of one defective - - 55
7. Propriety of attorney writing a letter before commencement of proceedings - - - 56
8. Offer of apology or compromise - 57
9. Offer of security on giving time, and what security - - 59
10. Notices, tenders, and demands on part of plaintiff. - - 60
11. Demand of copy of warrant. - 61
12. Notices of action. - - 63
13. Notice of attorney's lien. - 69
14. Enumeration and selection of remedies. - - - 70
15. Of Retaining counsel. - 71

CHAP. II. PROCEEDINGS BETWEEN THE RETAINER AND COMMENCEMENT OF LITI-

AN injury having been sustained, and cause of action complete, and a competent legal agent having been retained, it next becomes necessary to consider several points antecedent to actual litigation. We have in the preceding volume suggested some preliminary precautionary measures to be taken; but, besides those, there are, before the actual commencement of litigation, several points to be considered in this chapter, viz.

Subjects of this chapter.

FIRST, who was the party in legal contemplation injured, or who is the party to sue? *Secondly*, who was the wrongdoer, or party liable to be *sued;* and if doubtful, how are the facts to be ascertained? *Thirdly*, what is the cause or *ground of complaint;* and if doubtful, how is it to be ascertained? *Fourthly*, what is the *evidence* in proof of the whole cause of complaint; and if doubtful, how is it to be ascertained? *Fifthly*, of bills of discovery in general. *Sixthly*, demand of a sufficient security in lieu of one that is deficient. *Seventhly*, the propriety of the attorney *writing a letter* to the opponent before the commencement of any proceedings. *Eighthly*, the consideration of any offer of apology or compromise. *Ninthly*, the proposal of security on obtaining time, and considerations thereupon. *Tenthly*, notices of tenders and demands on the part of the plaintiff. *Eleventhly*, the demand in some cases of a copy of a warrant. *Twelfthly*, the notice of action to a justice. *Thirteenthly*, notice of

the attorney's or solicitor's lien or claim for costs. *Fourteenthly*, enumeration of the several remedies, and which is to be preferred. *Fifteenthly*, the retainer of Counsel.

First, who is the party injured, or who to sue.

First, It would seem on first view that no difficulty could arise in determining *who is the party injured?* and the answer would naturally and simply be, the party who has sustained the *inconvenience*. But this is by no means true in every case; and perhaps no branch of the law is occasionally more difficult than that respecting who is to be the proper plaintiff or plaintiffs *at law?* Courts of *Law*, in general, only recognize *legal* rights, and therefore an action of ejectment cannot, excepting against a mere trespasser within twenty years, be sustained on the demise of a cestui que trust, but the demise must be in the name of the trustees. (*a*) And an assignee of a bond, or chose in action, (excepting a bill of exchange or promissory note) must sue in the name of the obligee, and cannot proceed in his own name. These general observations will here suffice; the authorities and practice will hereafter be more fully considered, as well as regards the plaintiff at *Law* as the complainant or orator in *Equity*. But all questions as regard the party to a suit at law require consideration in the first instance, not only because an error would in general be fatal on the trial of any proceeding, but also because an attorney should secure proper authority to proceed, as well on behalf of all legal as well as equitable parties, the latter of whom would have to pay the costs; and so as to enable him even to write his preliminary letter upon the authority of every person legally or beneficially interested, and prevent any offence on account of their not having been previously consulted, which sometimes induces parties afterwards to release, or otherwise impede the proceedings. We have seen, that as regards the real or formal claimants of property, they may sometimes be unknown; and that in those cases, it is the proper course for executors and administrators, before they can venture to divide the personal assets, to advertise for *creditors;* or before they divide the residue amongst remote kindred, to advertise for near. (*b*) Those instances will suggest the expediency of *public advertisements and other proceedings* in various cases, to ascertain who ought to be the plaintiff at Law or in Equity. It may also occur, that an agent or other party who has the possession of

(*a*) *Ante*, Part I. pages 6, 7, 8.

(*b*) See the utility of advertisements for creditors. When that has been made, although the creditors may appear and claim at any distance of time, yet it will not be to the prejudice of the executors in payment of legacies after a year. *Greig* v. *Somerville*, 1 Russ. &. M. 338, *ante*, 1 Vol. 554.

CHAP. II. PROCEEDINGS BETWEEN, &c.

title deeds, or other documents, disclosing the parties to a title, or to a contract, or other proceeding, will refuse to produce them, and in such cases, after a courteous and proper formal application, it may become necessary to file a bill for a discovery and production of the document, in order to ascertain the proper party to sue and be sued, as well as the cause of action.

Secondly, who was the wrong-doer liable to be sued, and how to ascertain the facts.

Secondly, although *in direct* injuries it might be supposed that no difficulty could exist as to *the party to be sued*, it is sometimes otherwise; and in cases of malicious injuries, they are frequently on purpose committed so cautiously as to render discovery of the real wrong-doer exceedingly difficult. And yet of necessity, in general, the sufficient discovery should be obtained before the commencement of any proceeding at law.

In cases, whether of torts or contracts, after exhausting every other *civil* means of ascertaining who is the party liable to be sued, it should seem that a written *advertisement*, stating the injury and offering a reward for the discovery of the perpetrator, but taking care to avoid any libellous expression, would on principle be legal. (*c*)

In the case of a libel in a newspaper, the proprietors are obliged to disclose their names and places of abode, by filing an affidavit at the Stamp Office; and the act declares that production of a certified copy thereof and of a copy of the paper, shall be received in evidence against them of their liability. (*d*) But that enactment does not extend to any person who is not the proprietor or publisher; and therefore to connect the former with the publication, endeavour should be had to produce the manuscript he delivered to the printer. (*e*) The Stage Coach Act requires the proprietors of a coach to paint thereon the names of the proprietors, and the inscription or plate is to be evidence against them. (*f*)

If the printer of a libel promptly give up the original author, or discover the person who brought the paper to him, this is legally and equitably considered as ground of mitigation; (*g*) and in general it is advisable, on his payment of any costs

(*c*) *Ante*, vol. i. 453, 4.

(*d*) 38 Geo. 3, c. 78, s. 1, 2, &c. 9, 10, 11. *Rex* v. *Amphlett*, 4 Bar. & Cres. 35; 6 Dowl. & Ry. 125; *Cook* v. *Ward*, 6 Bing. 409; 9 Bar. & Cres. 382. In *Mayne* v. *Fletcher*, 9th May, A. D. 1829. K. B. Jones, Serjeant, moved for a new trial, and the Court held, that the production of *any* newspaper sufficed, under the 11th section of the Act, without proof of the defendant's publication thereof; and per Bayley, J. It is only *primâ facie* evidence, and the defendant may shew that some other person has published a false copy. MS.

(*e*) *Adams* v. *Kelly*, 1 Ryan & Moody's R. 157.

(*f*) 2 & 3 W. 4, c. 120; *Barford* v. *Nelson*, 1 B. & Adolp. 571.

(*g*) *Anon.* 2 Atk. 472.

already incurred, to abandon the proceeding against him, and to proceed only against the principal wrong doer. In cases of trespass or other tort, when the name of the wrong doer is not known, nor can be discovered after reasonable diligence, perhaps a bill to perpetuate the testimony of witnesses as to the right and injury, might be sustained. (*h*)

In cases also of *Contract*, difficulties frequently arise as to the parties liable to be sued. In these cases of contracts, as well as torts, it is advisable to address a courteous letter to the party supposed to be liable, stating the right and injury, or cause of action, and requesting him either to make compensation, or if he decline so doing, then at least to disclose whether he and what others, requesting him to name them, were concerned in the injury, and intimating that in case he should decline explicit communication, then it will become necessary to file a bill of discovery; and that if, for want of candour, that proceeding should be rendered necessary, the costs thereof may fall on him. (*i*) And in case of his refusal or neglect, in some cases, it may be advisable to file such bill for discovery; and it should seem, on general principles, that unless the answer would take the case out of the Statute of Limitations, (*k*) or would subject the party to a criminal proceeding, or to a penalty or forfeiture, (*l*) he would be bound to answer, notwithstanding he might thereby sustain some *pecuniary loss*, or otherwise prejudice his private interests; (*m*) and a bill even for the discovery of usury or other illegality is sustainable after the time for prosecuting for any penalty has expired; (*n*) and the same rule prevails at law whenever the time for suing for a penalty has expired. (*o*)

It has been expressly decided that a landlord may, by bill for a discovery, compel his tenant to disclose whether he has assigned a lease to an assignee, and to whom, in order to enable such landlord to sue the latter; though if the lease should contain any clause of forfeiture in case of assignment, it would be otherwise, unless the forfeiture be expressly waived; (*p*) and such a bill may also be filed against the *original lessee*, to ascer-

(*h*) See *Moodeley* v. *Moreton*, 1 Mad. Ch. R. 192; 1 Bro. C. C. 470; 2 Dick. 34.

(*i*) *Ante*, vol. i. 438, 9.

(*k*) *Mac Gregor* v. *East India Company*, 2 Simon's Rep. 452. In that case, unless the bill charged a written acknowledgment within six years, it would be demurrable, Id. ibid.

(*l*) *Fleming* v. *St. John*, 2 Simon's R. 181.

(*m*) 46 Geo. 3, c. 37; 3 & 4 W. 4, c. 42, s. 26. See *Cox and others*, 10 East, 399. See the cases when or not a defendant is bound to discover, 1 Madd. Ch. Prac. 214, *post*, 50, 51.

(*n*) *Talbot* v. *Smith*, 1 Ridgw. L. & L. *360; *Williams* v. *Farrington*, 3 Bro. C. C. 38; 2 Cox, 202; Chit. Eq. Dig. 664.

(*o*) *Roberts* v. *Allatt*, Mood. & Malk. 192.

(*p*) Tothill, 71; 1 Ves. 56; 1 Eq. Cas. Abr. 77; 1 Mad. Ch. Pr. 203.

tain whether an old lease has not expired, (q) though it is said that as an *assignee* of a lease is a purchaser, *he* might demur to such a bill against himself. (r)

Even a bill lies against a lessee and an equitable mortgagee by deposit of a lease, to compel the former to execute, and the latter to accept an assignment, so that the lessor might safely sue him at law, on the principle *qui sentit commodum sentire debet et onus;* (s) though this would in general be unnecessary, if such equitable mortgagee has taken possession, in which case he would be estopped from insisting that he is not assignee, unless he could prove that in truth he was merely an *under lessee.* (t)

As respects the right to obtain a *discovery* of parties to be made defendants in an action, or of other facts, the general rule seems to be, that where the discovery is *immaterial,* (u) or where on the face of the bill, it appears there can be *no remedy,* a discovery would be merely impertinent, and would not be enforced. (v) But that where the bill avers that an action *is brought,* or where the necessary effect in law of the case stated by the bill, appears to be, that the plaintiff *has a right to bring an action,* (w) he is entitled to a discovery to aid that action so alleged to be brought, or which he appears to have *a right and an intention to bring;* (x) and it is not necessary that an action should have been brought *previous* to a bill of discovery, in support of an action, (y) though it was in one case said, that a bill of discovery does not lie to create evidence for a *future* cause. (z) But it has never been laid down, that a person can file a bill, not venturing to state who are the persons *against* whom the action is to be brought, nor stating such circumstances as may enable the Court to judge upon the right to sue, but must state the circumstances, and aver that he has a right to an action against *certain named defendants or some of them.* (a) Upon these principles a demurrer was allowed to a bill, which did not allege with sufficient certainty, *by whom* the duties claimed by

(q) Tothill, 69; 8 Vin. Abr. 539; 1 Madd. Ch. Pr. 203.

(r) 8 Vin. Abr. 550; Fonbl. Treat. on Equity, 2 Vol. 488; 1 Madd. Ch. Pr. 203, *sed quære.*

(s) *Lucas* v. *Comerford,* 3 Bro. C. C. 166; 1 Ves. 235, S. C. *ante,* 1 Part, 319, 320.

(t) Peake's Law Evidence, tit. Covenant.

(u) Redesd. Tr. Pl. 155, 6, 3d edit., and cases there mentioned, and 1 Madd. Ch. Prac. 198.

(v) See *Rondeau* v. *Wyatt,* 3 Bro. C. C. 154; Finch. 36, 44; Redesd. Tr. Pl. 15; 1 Mad. Ch. Pr. 198.

(w) *Moodaly* v. *Moreton and East India Company,* 2 Dick. 34; S. C. 1 Bro. C. C. 468; 1 Mad. Ch. Pr. 198.

(x) *French* v. *Finch,* 2 Ves. 294; but see note (w), *supra,* and 1 Mad. Ch. Pr. 198, 9, *contra.*

(y) Id. ibid.

(z) Id. ibid.

(a) *Mayor and Citizens of London* v. *Levy,* 8 Ves. 404.

the city of London under letters patent, in respect of which a discovery was prayed in aid of an action were payable; (*b*) though, if the bill had stated that by reason of combination, it was so managed that the plaintiff could not bring an action, and therefore there ought to be an account of the fees in a Court of *Equity*, such bill might have been sustained. (*c*)

Formerly, in cases even of *trespass* no inconvenience resulted to the plaintiff from his unreasonably including too many persons as joint trespassers in an action, for the acquitted defendants had no remedy for their costs; and thence it became the practice perhaps, without any pretence whatever, to proceed jointly against all who might by any probability have been present, and even so as thereby unjustly to endeavour to exclude any adverse testimony. But this injustice, as regarded actions of *trespass*, was in a degree put an end to by the statute 8 & 9 W. 3, c. 11, which gives acquitted defendants their costs, unless the Judge shall certify that there was reasonable ground for joining them as defendants. (*d*) But as this act extended only to actions of *trespass*, and it had become a practice to include any number of defendants in actions of trover, or on the case, and in replevin, and against executors, (*e*) the same provision was by the recent Law Amendment Act extended *to all personal actions*. (*f*) Since this enactment it is certainly the duty of an attorney to ascertain who are the precise parties whom it is at least reasonable to include in the action.

In cases of *contracts*, until the recent act, a claimant incurred the risk of including too many or too few parties as defendants. In general, even at the present day, if he in his *first* action include *too many*, on their own supposed contract, the objection will, on the trial, be ground of nonsuit, and entire failure in that action. (*g*) If on the other hand he joined *too few*, then any one of the defendants actually sued might plead, in abatement, the *non-joinder* of an omitted party; and, if such plea were true, the plaintiff was compelled to begin *de novo*, and if the omitted party were out of the realm, the plaintiff must have proceeded by special original and outlaw the absent party (though irregularly

(*b*) Id. ibid 8 Ves. 393.

(*c*) Ibid. 8 Ves. 405; 1 Mad. Ch. Pr. 199.

(*d*) 8 & 9 W. 3, c. 11, s. 1.; see cases Tidd. 9th edit. 986.

(*e*) 3 & 4 W. 4, c. 42, s. 32; see former cases, Tidd. 9th edit. 986.

(*f*) Section 32, enacts, That where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action, shall have *a verdict* pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless in the case of a trial the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was *a reasonable cause* for making such person a defendant in such action.

(*g*) 1 East Rep. 52.

so, (*g*) before he could proceed with effect against the defendants in England, and in which proceedings to outlawry there was considerable risk of irregularity. (*h*) To remedy this defect in the law, a most important new provision was introduced in the recent act for the amendment of the law, which in effect puts an end to pleas in abatement when the omitted party is *out of the kingdom*, by requiring a party pleading nonjoinder in abatement, to aver in the plea that the party omitted was, and is, *resident* within the jurisdiction of the Court; and to state and verify in his affidavit, the place of residence of such person with convenient certainty. (*i*) Since this act no plea in abatement for nonjoinder can be effectual when the omitted party resides out of the kingdom, and if he reside here and the plea be true, the plaintiff may immediately enter a *cassetur* and begin *de novo* against all the proper parties; and in such *second* action he is to have a verdict against such persons as he shall prove to be liable, although he fail as to the rest. (*j*)

Thirdly, what the cause or ground of action, and how to be ascertained.

Thirdly, it will next be the duty of the complainant's attorney, well to ascertain the *precise cause of action* being the right and injury, whether independent of contract or founded on contract. The particulars of these may be ascertained by any means short of the breach of personal confidence. If they cannot be obtained by civil means without legal measures, then a bill for a discovery may in most cases be filed; as to compel a defendant to admit or deny whether he did not promise marriage to the complainant, and so as to enable her to sustain an action for the breach; (*k*) or whether he did not by some memorandum in writing, signed by him, within six years, effectually take the case out of the Statute of Limitations; (*l*) so a bill lies for the discovery of assets, to enable the plaintiff to bring an action at law against an executor or administrator; though in this case, the bill must charge, that assets or goods of the testator have come to his hands; (*m*) or the creditor or legatee, or next of kin, may cite and compel such personal representatives to exhibit a

(*g*) *Bryan* v. *Wagstaff*, 5 Bar. & Cres. 314.

(*h*) Tidd. 9th edit. 128.

(*i*) 3 & 4 W. 4, c. 42, s. 8, enacts, "That no plea in abatement for the non-" joinder of any person as a co-defend-" ant shall be allowed in any Court of " Common Law, unless it shall be stated " in such plea that such person is resi-" dent within the jurisdiction of the " Court, and unless the place of resi-" dence of such person shall be stated " with convenient certainty in an affi-" davit verifying such plea." And section 9, enacts, "That to any plea in " abatement in any Court of Law, of the " nonjoinder of another person, the " plaintiff may reply that such person " has been discharged by *bankruptcy and* " *certificate*, or under an act for the " Relief of Insolvent Debtors."

(*j*) 3 & 4 W. 4, c. 42, s. 10.

(*k*) Forrest's Rep. 42.

(*l*) *Cock* v. *Wilcock*, 5 Mad. Rep. 331; *Mac Gregor*, v. *East India Company*, 2 Simons, R. 454.

(*m*) 1 Ch. Cas. 226; 1 Madd. Ch. Pr. 207.

declaration, or inventory, or account of assets and expenditure, in the Ecclesiastical Court; (n) and in cases within its proper jurisdiction, that Court has power to compel a discovery as well as a Court of Equity. (o)

It is said, however, that a bill does not lie in equity to discover whether a particular person exists, or where he is, so as to enable the plaintiff to make him a party to a bill; but the authorities do not agree upon that point. (p)

The statute 6 Ann, c. 18, enables persons having an estate in remainder, reversion, or expectancy, after the death of any person, upon affidavit of his belief of the death of such person and the concealment thereof, once a year to move the Lord Chancellor for his order to produce such person or persons, not exceeding two; and if the production be refused, and no sufficient evidence of the continuance of the life be established by affidavit, the person so concealed is to be taken to be dead, and the person entitled in remainder, &c. may enter upon the estate. (q) A personal annuity payable during the lives of several named persons, would not be within this act; and therefore it would be well for a grantor of an annuity to stipulate in the deed for the production, from time to time, of sufficient evidence of the continuance of the lives, in order to avoid the necessity for filing a bill of discovery; and which, it is apprehended, he might effectually do. (r)

Fourthly, what is the evidence, and how it is to be ascertained.

We have suggested the expediency of ascertaining the evidence in the first instance, before even giving any intimation to the opponent of intended litigation (s); and we have seen, that it is the duty of an attorney to ascertain, at least, that there will be sufficient evidence to sustain the proceeding *before he commences it*; (t) and, if he should proceed to trial without seeming adequate evidence, and the plaintiff be nonsuited, he would be liable to an action for such negligence. (u) Too frequently proceedings are commenced merely upon the client's statement; but the safest course is, in the first instance, to examine, at least, *the principal witness*, so as to ascertain that probably the client may safely proceed, especially as the evidence may affect even *the form of action*, or the pleadings; or at least, the attorney should secure proof that he has suggested

(n) *Ante*, 1 Vol. 517, tit. Executors.

(o) *Dun* v. *Coles*, 1 Atk. 289, and other cases, 1 Mad. Ch. Pr. 208.

(p) *Chancey* v. *Tahourdin*, 2 Atk. 393, *accord*; but see 1 Vern. 93, cited Redesd. Tr. Pl. 227, *contra*, cited 1 Mad. Ch. Pr. 209.

(q) 6 Ann, c. 18, ss. 1, 2, 3, and 4; see *Vincent* v. *Farnandez*, 1 P. Wms. 524; 2 Mad. Ch. Pr. 716.

(r) *Semble*, 1 Madd. Ch. Pr. 206.

(s) *Ante*, Vol. 1. p. 440 and 510.

(t) *Ante*, 21, 2.

(u) 4 Bar. & Ald. 202.

CHAP. II. PROCEEDINGS, BETWEEN, &c.

to his client the expediency of an immediate examination of the evidence, and that such client has, to avoid expense, or on some other account, expressly dispensed with it. If the evidence be in any respect doubtful, then after a proper written application to the defendant, a *bill for a discovery* may be filed against him; or if the death of one or more material witnesses should be apprehended, we have seen some instances when it may be proper to file a bill to perpetuate the testimony. (*v*) We have seen, that it rarely occurs that an answer to a bill will contain so unqualified an admission as to enable a plaintiff to use it in proof of his case at law; but still there are cases in which it will be expedient to endeavour to obtain some admission by the defendant. (*w*)

Fifthly, bills for discovery, and costs thereof.

Fifthly, the full consideration of bills for discovery more properly belongs to the *fourth* part, relating to Suits in Equity; (*x*) but we will, nevertheless, here notice the principal points in connection with proceedings at law. Upon a bill, praying nothing but a discovery (and not also relief), it has been held, that the *plaintiff* shall not have his costs, and even that the *defendant* is entitled to *his costs*, and those even as between attorney and client. (*y*) It is presumed that this rule has prevailed upon the supposed principle, that it was originally the *plaintiff's own fault* not to secure evidence, and that, therefore, he ought to pay the costs of any trouble he may afterwards occasion the defendant by requiring him to communicate such evidence. Where there was no privity between the parties, that reason may, perhaps, be just; but certainly not so where there has been any privity, and an implied duty or contract at all reasonable times to disclose the requisite information, as in the case of agents. (*z*) Mr. J. Buller thought, the rule thus laid down was *too general;* and was of opinion that if the plaintiff is entitled to the discovery, and goes first to the defendant to ask for the accounts to which he has in justice a right, especially if he goes in such a civil manner as men ought to observe

(*v*) *Ante*, 1 Vol. 733; 2 Madd. Ch. Pr. 250, 1; but note that the suit at law must have been *previously* commenced, to sustain a bill to perpetuate; *id. ibid.*; so that, in strictness, this suggestion should be introduced in a subsequent chapter.

(*w*) *Ante*, 1 Vol. 440.

(*x*) See in general 1 Madd. Ch. Pr. 196 to 218; and Chitty's Eq. Dig. tit. Pleading, Answer 3, 4, 5, page 756 to 764, and 778 to 780; id. 889; and id. title *Practice, Costs*, p. 929.

(*y*) *Simmonds* v. *Lord Kinnaird*, 4 Ves. 476; *Cartwright* v. *Haloly*, 1 Ves. j. 293; *Noble* v. *Garland*, 1 Madd. Rep. 344; *Hewart* v. *Semple*, 5 Ves. 86; Redes. Tr. Pl. 164.

(*z*) *Semble;* When a defendant has *previously covenanted* to discover, and to answer any bill of discovery, he is compellable to discover, although it might endanger his pecuniary or other interests; 1 Strange, 168; and 1 Madd. Ch. Pr. 215, note (*m*).

in asking for their rights; then if the defendant refuse, and the plaintiff is thereby compelled to file a bill for a discovery, he (the *defendant*) ought not to have his costs; though when a bill is precipitately filed, it may be just that the plaintiff should pay them. (*a*) In a case at law, the counsel complained of the hardship of a plaintiff in equity being obliged to pay the costs of a discovery; upon which Lord Kenyon observed, that he had once heard Lord Mansfield say, he thought in such a case, the court of law ought to allow the costs paid by the plaintiff to the defendant in equity as costs at law; and that he was struck with the propriety of the observation, and thought it would be a good rule to be observed. (*b*)

Sixthly, demand of a legal security, in lieu of one defective.

Sixthly, it is essential, when the claim of a client is founded on some *written security*, to ascertain first whether it is sufficient in its terms; and, secondly, whether it is properly stamped; for if it has been framed contrary to the understanding of the parties, as a joint security, when one joint and several was intended, or otherwise, it will be necessary, before any proceedings at law thereon, which might be considered an adoption of the security, to make a formal application to the other party for a correct contract, signed by him and all the other parties; and if refused, then a bill to enforce the delivery may be necessary; (*c*) and where there was an express agreement to give a valid note, and the party gave one on an improper stamp, a court of equity would enforce the delivery of a valid note, (*d*) though it has been supposed that in general a court of equity cannot relieve against a defect in the stamp, as the parties acted illegally in accepting a security not properly stamped. (*e*) If there were a valid agreement sufficient at law, then indeed the party, after requiring the delivery of a proper security, might sue at law separately for not giving it, and thereby avoid the necessity for any proceeding in equity. In one case, under particular circumstances, where it was the duty of the *defendant* to have got an agreement stamped within twenty-one days, but he neglected to do so, in conse-

(*a*) *Weymouth* v. *Boyer*, 1 Ves. j. 416; and 1 Madd. Ch. Pr. 217, note (*y*), where that author states he had heard Lord Eldon approve that doctrine; and why ought not a *plaintiff to receive* costs where a defendant has unnecessarily compelled him to file a bill, the same as in case of an interpleader bill; 1 Madd. Ch. Pr. 181; *Aldridge* v. *Mesner*, 6 Ves. 419. If even a trustee refuse to join in a conveyance, he may be decreed to pay all the costs of a bill for specific performance thereby rendered necessary; *Jones* v. *Lewis*, 1 Cox, 199; 2 Madd. Ch. Pr. 552.

(*b*) *Grant* v. *Jackson*, Peake Rep. 203; but without a *contract* express or implied, to communicate the matter discovered, and a special count for not making the communication, and stating the consequent necessity to file the bill and incur the costs, the latter could not be recovered at law.

(*c*) *Ante*, 1 Vol. 710, 711, 859, 860; *Rawstone* v. *Parr*, 3 Russ. 424, 529; *Crosby* v. *Middleton*, Prec. Chan. 309.

(*d*) *Aylett* v. *Bennett*, 1 Anstr. 45.

(*e*) *Ante*, 710.

quence of which omission the plaintiff was obliged to pay the duty and 5*l.* penalty, the Judge permitted the plaintiff to recover the amount as damages. (*f*) In general, when an instrument (excepting a bill of exchange, promissory note, or receipt) has not been duly stamped, it suffices to get the proper duty impressed at any time before the trial at law or in equity; (*g*) and it will be better to delay that expense until it has become absolutely necessary, as it may, perhaps, be prevented by compromise or by admission of a copy of the document to be read in evidence, or sometimes by a Judge's order. (*h*)

Seventhly, propriety of attorney's writing a letter to the intended defendant before any proceedings, and of making a proper demand.

As attornies and solicitors should never allow themselves to be contaminated by the angry feelings of their clients, or their quarrels *inter se*, so it is essential that they should conduct all stages of the suit with all possible courtesy towards the opponent, and write a civil letter to him in sufficient time before any proceedings be commenced, so as to enable him to prevent expense; unless, indeed, it be expected that he will abscond to avoid arrest, or keep out of the way to avoid the service of process, in which cases only the omission of a previous letter can be excused. The omission of such a letter generally excites angry feelings towards the attorney as well as the plaintiff, and induces the party afterwards to take advantage of any trifling error, which he would otherwise be ashamed of even noticing. Formerly, on taxing costs, no charge for such a letter was allowed to an attorney for the plaintiff against the defendant; but the propriety of encouraging this preliminary step has of late induced a contrary practice. (*i*) The letter need only state, "that the attorney has been instructed by A. B. to "commence proceedings against the party for £—— [or what- "ever may be the subject of the intended suit], and that unless "the same is paid before a named day (allowing sufficient time "to raise the money), the expense of proceedings will be in- "curred without further notice." If the plaintiff's claim would

Terms of such letter.

(*f*) Esp. Rep. But that decision must not be brought into precedent.—See case of a motion against an attorney on account of an insufficient stamp. 2 Smith. Rep. 155, 6

(*g*) Chitty's Stamp Acts; where see the excepted cases, and *Middleton* v. *Briscoe*, 11 Ves. 395.

(*h*) *Semble*, under 3 & 4 W. 4, c. 42, s. 15.

(*i*) On a trial before Sir J. Mansfield, of an action between an attorney and his client, an arbitration was proposed, but in consequence of some previous high words upon the subject of such a letter having been written by such attorney without authority from his client, and his therefore refusing to pay it, the attorney refused to refer the cause, unless the charge of 3*s.* 6*d.* for writing such letter was at all events paid; and the cause being in consequence about to proceed, Sir J. Mansfield declared that he thought the charge legal and reasonable, and ought to be paid, and actually paid the 3*s.* 6*d.* in Court out of his own pocket, in order that the cause might be so settled; but which the attorney immediately afterwards very properly returned to the judge's clerk.

by a proper demand under the recent Act 3 & 4 Wm. 4, c. 4, s. 28, entitle the plaintiff to *interest*, then, in addition to the usual language of the attorney's letter, *a demand of interest*, in the subscribed form, should be added. (*j*) At law it is not material that the demand should be of the precise sum; for if the plaintiff demand too much, the defendant must, nevertheless, tender or pay into Court a sum to cover what is really due, and pay costs to the time of such payment; but in *equity*, it is important that the demand, or at least the suit, be not for too large a sum; for if the claim, as in a tithe suit, be larger than the plaintiff can support, the Court will give costs against him for the excess, up to the time of his giving notice of abandoning any part of the excessive demand made by the bill. (*k*)

Eightly, of proposals for an apology or a compromise.

We have in a preceding page observed upon the propriety and mode of asking for or proposing an apology. (*l*) Many causes of action and claims may with propriety be brought forward principally, if not entirely, with a view to clear up character, (*l*) or obtain explanation, or prevent the repetition of affront or small injury; and no sensible party would willingly continue a suit which may rather amuse the public than obtain any substantial compensation. Hence it is the peculiar duty of an attorney in such cases to afford opportunities for apology, though it might be injudicious absolutely to ask it at the risk of contemptuous rejection. On the other hand, no gentleman or liberal minded man ought to require too humiliating an apology, which would reduce even the value and utility of the explanation; and if rejected on that ground, the very circumstance of the parties having insisted upon it, would probably reduce the damages to the smallest coin. (*m*)

Form of a written demand of interest pursuant to 3 & 4 W. 4. c. 42. s. 28, to be added in the attorney's letter, demanding payment of a debt.

(*j*) And I do further, for and on behalf of the said *A. B.*, and by his directions and without prejudice to any prior demand or right to recover any antecedent interest, hereby according to the recent statute in that behalf, give you notice that the said *A. B.* doth and will claim interest on the said debt and sum of ———*l.* from the date of this demand, and until the term and time of actual payment of the said debt; and I do hereby, as such attorney as aforesaid, demand and require of you to pay such interest accordingly. Dated, &c.

Yours, &c.

E. F., attorney for the plaintiff.

To Mr. ——.

(*k*) *Woolley* v. *Brownhill*, 13 Price, 500; 1 M'Clel. 317, S. C.

(*l*) *Ante*, 1 Vol. 562, 3.

(*m*) In a recent case, a collector of poor rates had by mistake levied for rates which had already been paid; and he wrote a letter explaining the circumstances, and regretting the mistake, offering compensation, and concluding as follows, and which letter materially influenced the judge and jury in his favor, and against the plaintiff, who had taken no notice of such letter.

Terms of an apology.

"I can only repeat that I am exceedingly sorry for any trouble or inconvenience the error may have put you to; we are none of us infallible; and as there was nothing personal intended on my part, I trust you will see the propriety of not making it so on yours, as I took the earliest opportunity I could of rectifying it. I am, Sir, your obedient servant, *C. D.*"

"To Mr. *A. B.*"

CHAP. II. PROCEEDINGS BETWEEN, &c.

Compromises.

As to *compromises*, they may be made and invited by the attornies on each side; and if made either impliedly, and still more if expressly, without prejudice, they cannot be taken advantage of injuriously by either party. We have seen how *bonâ fide* and fairly conducted must be all negociations for a compromise. (*n*) The offer of a compromise should be liberal, fair, and adequate to the circumstances, and not so exceedingly trifling or concerted as to excite contempt; and therefore, in equity, where costs are in general discretionary, a defendant having endeavoured to get the plaintiffs to come to an agreement with him to take a very small sum of money in satisfaction of all his interest in an estate, the Court, principally on account of such offer, made him pay the costs of the suit. (*o*)

On the other hand, there is a rule in equity important as regards the refusal of an offer of accommodation, namely, that if a plaintiff should be absurd enough to refuse a fair offer of accommodation, and obstinately persist in his suit, it is considered as an aggravation, and the bill if dismissed will be so with costs, although it might have been otherwise if no such accommodation had been offered or rejected. (*p*)

We have seen when or not a claim connected with a *criminal* charge may be *compromised*. (*q*) It has been lately decided, that a promissory note given by a defendant in prison after conviction for a misdemeanour, and before sentence, in pursuance of a recommendation of the Court to compromise, is valid, although the Court was not apprised of the *terms* of the compromise, and although the costs of the prosecution were included in the note. (*r*)

As regards compromises where there are *several* claimants and opponents, it is, at least at law, considered that all must concur, or the suit must proceed. But a different doctrine was recently, at least, established in equity in one case, where certain parties to a suit beneficially interested in the subject matter desired to compromise it, but other parties in the same interest, not insane, nor under age, objected; and the Vice-Chancellor, after referring it to one of the Masters, and receiving his report that the compromise was prudent and expedient, confirmed the compromise by his order, and the Chancellor on appeal refused to

(*n*) *Ante*, 23, 4.

(*o*) *Avery* v. *Osborne*, Burr. 349; 2 Chit. Eq. Dig. 911.

(*p*) *Big* v. *Grubb*, 2 Atk. 48; 2 Mad. Ch. Pr. 549.

(*q*) *Ante*, 1 Vol. 17.

(*r*) *Kirk* v. *Strickwood*, 1 Nev. & Man. 275.

disturb such order. (*s*) So when shipowners (*t*) or partners (*u*) disagree, a court of equity can effect any just arrangement assented to by the majority. Indeed, the majority of partners or tenants in common may, in general, effect any just arrangement at law.

CHAP. II. PROCEEDINGS BETWEEN, &c.

Ninthly, proposals for time, and *what security* to be required or accepted.

Perhaps no circumstance is of more frequent occurrence, than the defendant's requesting time on his giving security, and which may be either real or personal, or collateral. Here the attorney for the plaintiff is bound immediately to communicate the offer to his client, and suggest the expediency of due inquiry into the sufficiency of the security, as well in fact as in law; and if such inquiry would be attended with any expense, should require an express written agreement from the defendant to pay the same. (*v*) If a part payment from one of several debtors be proposed, upon his being released, such terms may be safely accepted, provided there be no instrument executed that would operate as a release to the other debtors, nor prejudice the claim on a party who is substantially only a surety; the former may be effected by a short deed reciting the part payment, and the plaintiffs *covenanting* not to sue the party paying, except for conformity. (*w*) If indulgence or time is to be given to a principal debtor, care must be observed to obtain the express signed engagement of *every surety*, that the giving such indulgence shall not prejudice the claim upon him at the enlarged time; or in case of his death, even in the mean time. If the collateral security of a third person is to be taken, then care must be observed that it be either framed expressing the consideration, and otherwise so as to avoid any objection under the statute against frauds; (*x*) or that it be by a legal bill of exchange, (*y*) or, which would be safer, by express covenant under seal. (*z*) In all cases where there are to be several contracting parties, care should be observed that the covenants be *several* as well as joint, so as to secure a remedy *at law* against the assets of any party who may die, (*a*) and even to require a stipulation that suits may be brought against all jointly, or each separately; or even against

(*s*) *Brazier* v. *Hudson*, Sittings in Lincoln's Inn, 20th August, 1833, reported in the Legal Observer of 28 Sept. 1833, page 409.

(*t*) *Ante*, 1 Vol. 717, 8.

(*u*) Ibid. 850, 1.

(*v*) See the reason, equally here applicable, *ante*, 1 Vol. 300, 1.

(*w*) See *Dean* v. *Newhall*, 8 Term Rep. 168; and see the form of the deed settled by Mr. Preston, and by the author, 4 Chitty's Commercial Law, 356.

(*x*) 29 Car. 2, c. 3, s. 4, *ante* 1 Vol. 126, 7.

(*y*) *Ridout* v. *Bristow*, 1 Tyr. R. 84; 1 Cromp. & J. 231. S. C.

(*z*) *Ante*, 1 Vol. 823.

(*a*) *Ante*, 1 Vol. 121; *Rawstone* v. *Parr*, 3 Russ. R. 424.

CHAP. II. PROCEEDINGS BETWEEN, &c.

any two or more, where the parties are numerous. (*b*) If a deposit of goods is to be made by way of mortgage or *lien*, care should be observed to stipulate for a power of sale. (*c*)

In the next place, if a *warrant* of *attorney* or *cognovit* be offered, reference must be had to the provisions in the *Bankrupt* (*d*) and *Insolvent* Acts, (*e*) which in certain cases defeat the benefit of those securities, especially the former.

In case of *general insolvency*, or inability to pay *all* debts in full, or at all *promptly*, at the appointed times, to avoid a fiat in bankruptcy, deeds of *inspection* or of *composition*, or *letters of license*, are frequently proposed and accepted. These are arrangements requiring a distinct consideration. (*f*) We shall here merely observe, that in order effectually to protect the property assigned to trustees and creditors, the signatures of one or more of the creditors should be immediately obtained. (*g*) The statement of the whole of the official duties of a solicitor on these occasions, would be in effect a repetition of all the steps to be taken, considered in the previous volume.

Tenthly, of notices, tenders, and demands, on part of plaintiff, of different descriptions.

If the wrong-doer should neglect to pay, or make satisfaction, pursuant to the attorney's request, then before the commencement of any proceedings, it will be essential to consider whether it is necessary or advisable to serve upon him any *formal written demand*, whether of goods, (*h*) or of an account, (*i*) or of performance, (*j*) or the production of a supposed justice's warrant and copy thereof, or other authority, under color of which the wrong-doer may have acted. If the slightest doubt should exist upon the necessity for either of those measures, or of the evidence of their having been adopted, each should be *repeated*, and this even in the presence of *two* witnesses, to avoid the risk of the death of one. One further caution is here *also* to be observed, *viz.*, to keep *duplicates* of all notices and proceedings, so that each part be a *duplicate* of the other, and in effect an original; and also to avoid the multiplication of witnesses, so that the *same* witness who has written the original, or the duplicate, or copy, and examined the same, shall himself deliver it to the party to

Precaution in mode of giving notice in general.

(*b*) *Semble*, the latter stipulation would enable a plaintiff to sue accordingly.

(*c*) *Ante*, 1 Vol. 491, 2.

(*d*) 6 G. 4, c. 16, s. 108; 1 W. 4, Sess. 1, c. 7, s. 7; *Godson* v. *Sanctuary*, 1 Nev. & Man. 52.

(*e*) 7 G. 4, c. 57, s. 32; *Sharpe* v. *Thomas*, 6 Bing. 416; *Herbert* v. *Wilcox*, id. 203; *Godson* v. *Sanctuary*, 1 Nev. & Man. 52; *Wray* v. *Egremont*, 4 Bar. & Adol. 122.

(*f*) See Montague on Composition; and fully, 3 Chitty's Commercial Law, 687 to 721; Chitty on Bills, 8th ed. 96, 7, 8, 606, 803.

(*g*) *Small* v. *Marwood*, 9 Bar. & Cres. 300; *Crewe* v. *Dicken*, 4 Ves. j. 97, *ante*, 1 Vol. 303.

(*h*) *Ante*, 1 Vol. 566, 497, 498.

(*i*) *Ante*, 1 Vol. 497.

(*j*) 1 Vol. 496, 498.

whom it is addressed, or himself put the same in the proper post office, without any intervening third person. (*l*)

Eleventhly, demand of perusal and copy of justice's warrant.

Whenever a party has committed a trespass, or other injury "*in obedience to*" (that is, *strictly* according to the *directions* of a justice's warrant, and not exceeding what was thereby expressly or impliedly directed to be done), it becomes necessary to *demand a perusal of the warrant*, and of a copy thereof; and if the request should be complied with within six days, then if it should appear that the officer acted strictly according to the justice's authority, he is protected in such his obedience, and he must not be sued; and, in that case, if the magistrate acted illegally in issuing such warrant, *he* should be served with a calendar month's notice of action; (*m*) and after the expiration thereof, and within six calendar months after the injury was committed, he should be *sued*. But if the magistrate had jurisdiction, and himself acted *regularly*, but some *third person maliciously* caused him to issue the warrant when there was no just ground for the same, as maliciously obtaining a search warrant, then the action can only be sustained against such *third* person. The necessity for demanding an inspection of the supposed warrant, depends on the *General Act*, 24 Geo. 2, c. 44.

The 6th section enacts, "That no action shall be brought "against any constable, headborough, or other officer, or against "any person or persons acting by his order, and in his aid, for "any thing *done* in *obedience to any warrant*, under the hand "or seal of any Justice of the Peace, until demand hath been "made, or left at the usual place of his abode, by the party or "parties intending to bring such action, or by his, her, or their "attorney or agent in writing, signed by the party demanding "the same, *of* the perusal and copy of such warrant, and the "same hath been refused and neglected for the space of six days "after such demand; and in case after such demand, and com-"pliance therewith, by shewing the said warrant to, and per-"mitting a copy to be taken thereof by the party demanding "the same, any action shall be brought against such constable, "headborough, or other officer, or against such person or per-"sons acting in his aid, for any such cause as aforesaid, without "making the Justice or Justices who signed or sealed the said "warrant defendant or defendants, that on producing or proving "such warrant at the trial of such action, the jury shall give

(*l*) *Toosey* v. *Williams*, Mood. & M. 129; and *Hetherington* v. *Kemp*, 4 Campb. 193.

(*m*) See *post*, 63, 4.

"their verdict for the defendant or defendants, notwithstanding "any defect of jurisdiction in such Justice or Justices; and if "such action be brought jointly against such Justice or Justices, "and also against such constable, headborough, or other officer, "or person or persons acting in his or their aid as aforesaid, then "on proof of such warrant, the jury shall find for such constable, "headborough, or other officer, and for such person and persons "so acting as aforesaid, notwithstanding such defect of jurisdic- "tion as aforesaid: and if the verdict shall be given against the "Justice or Justices, that in such case the plaintiff or plaintiffs "shall recover his, her, or their costs against him or them, to be "taxed in such manner by the proper officer as to include such "costs as such plaintiff or plaintiffs are liable to pay to such "defendant or defendants for whom such verdict shall be found "as aforesaid." (*n*)

Section 7th provides, "That where the plaintiff in any such "action against any Justice of the Peace shall obtain a verdict, "in case the Judge before whom the cause shall be tried shall "in open Court certify on the back of the record, that the in- "jury for which such action was brought was wilfully and "maliciously committed, the plaintiff shall be entitled to have "and receive *double* costs of suit."

Section 8th provides, "That no action shall be brought against "any *Justice* of the Peace for any thing done in the execution "of his office, or against any constable, headborough, or other "officer or person *acting as aforesaid*, unless commenced within "six calendar months after the act committed." (*o*)

Upon the 6th section, requiring the demand of a copy of the warrant, it has been recently decided that a plaintiff is not bound to demand a copy of a warrant before commencing his action, in any case where a constable, overseer, or other party, has not acted *strictly in obedience* to the warrant; nor in any case where the justice who issued the same could not be sued; for the object of the statute in making a demand of the warrant neces-

Form of demand on a constable of the perusal and copy of warrant.

(*n*) The form of the demand of the perusal of a warrant is thus:

Sir,—I do hereby, as the attorney (or "agent" according to the fact) of and for *A. B.* of, &c. according to the form of the statute in such case made and provided, demand of you the perusal and copy of the warrant, by virtue or under colour whereof you did, on or about the —— day of —— last, imprison the said *A. B.*, and carry and convey him in custody to and before *G. H.*, Esquire, one of his Majesty's justices of the peace in and for the county of ——, [*or* seize, take, and carry away certain goods and chattels, to wit, &c. (naming the quantities and description of each) of the said *A. B*, of great value, to wit, of the value of ——*l*., and did convert and dispose thereof to your own use]. Dated, &c. —— day of ——, A.D. ——,
E. F., &c.

To Mr. *C. D.*

(*o*) As to the construction of this section, *ante*, 1 Vol. 772 to 775.

sary, was that the justice might be properly joined or made a defendant. (o) Hence, therefore, in all cases when it is certain that a wrong-doer has exceeded any authority that was given to him by the terms of a warrant; as if under a warrant to take the goods of *B.*, or certain described goods, he has taken the goods of *A.*, or goods of a different description; or has broken open an outer door, which the warrant did not authorize; or has taken an excessive distress; or has been guilty of any excessive force or other irregularity; then the party injured may and ought, without delay, to proceed only against the immediate wrong-doer, for the excess, unless indeed the issuing the warrant itself was clearly illegal; in which case it might be preferable to proceed against the magistrate or the party maliciously causing the warrant to be issued: the choice of which remedies must greatly depend upon the circumstances of each particular case, and should materially be governed by the answer to the question,—which proceeding will probably be most productive.

Twelfthly, when a *notice of action* must be served, and requisites thereof.

It is well known, that Justices of the Peace, (p) and revenue officers, whether of the Customs or Excise, (q) and many other either general or local officers and persons are powerfully protected by several regulations; (p) as first, that requiring a certain *notice of action* to be duly served, in general a *calendar month* before its commencement; *Secondly*, enabling each to *tender amends* before action; *Thirdly*, enabling each to *pay into Court* a sum sufficient to cover the damages, when he has neglected to *tender* in due time; *Fourthly*, requiring the action to be commenced within a short limited time after the injury; as against Justices, *six calendar months;* and against custom and excise officers, even *three lunar months; Fifthly*, rendering it essential that the *venue* be laid in the proper county where the injury was committed; *Sixthly*, enabling the defendant to plead the *general issue* or the tender, and give special matter in evidence. We have already considered some of the constructions upon these acts. (r)

Notices to *Justices* in particular.

The principal statute, the construction of which is most frequently the subject of discussion, is 24 Geo. 2, c. 44, relating to *Justices of the Peace,* and Inferior Officers of Justice. It en-

(o) *Sturch* v. *Clarke*, 4 B. & Adol. 113; and as to the demand of a copy of the warrant in general, see *Kay* v. *Grover*, 7 Bing. 312, and Chitty's Col. Stat. tit. Justices.

(p) Justices, 24 G. 2. c. 44; Tidd. 9th edit. 28, 29, 30; Chitty's Coll. Stat.; and see Constructions, *ante*, Vol. 1, 772 to 775.

(q) Customs and Excise, 28 Geo. 3, c. 37, s. 25; 6 Geo. 4, c. 108, s. 97; 7 & 8 Geo. 4, c. 53, s. 115; *ante*, 1 Vol. 772 to 775.

(r) *Ante*, 1 Vol. 771 to 775.

CHAP. II. PROCEEDINGS BETWEEN, &c.

acts, "That no writ shall be sued out against, nor any copy of "any process, at the suit of a subject, shall be served on any "*Justice*, for any thing by him *done in the execution of his office*, "until *notice in writing* of *such intended writ or process* shall "have been delivered to him or left at the usual place of his "abode, by the attorney or agent for the party who intends to "sue or cause the same to be sued out or served, at least *one* "*calendar month* before the suing out or serving the same: in "which notice shall be clearly and explicitly contained, the "*cause of action* which such party hath or claimeth to have "against such Justice; on the back of which notice shall be "*indorsed* the name of such attorney or agent together with "the place of his abode, who shall be entitled to have the fee "of 20*s*. for the preparing and serving such notice, and no "more."

The 2d, 3d, 4th and 5th sections of the act, enable the Justice to tender amends and plead the same, and to plead the general issue, and give the special matter in evidence, and to pay a sum to cover damages into Court; and provide that the plaintiff shall not recover unless he prove the due service of a notice of action; and that no injury, not specified in the notice, shall be proceeded for. The 6th section relates to the demand of the copy of a Justice's warrant, and the joining him in an action. The 7th section subjects Justices to *double* costs, when the Judge who tried the cause shall certify that the injury was wilful and malicious; and the 8th section limits all actions against Justices, for what has been done by them in execution of their office, to six calendar months.

Decisions on the statutes. Who a Justice within the act.

The constructions of this act establish, that a *person illegally acting as a Justice*, without legal qualification, and when sued for the penalty on that very account, *is not a Justice* within the meaning of the act, and consequently is not entitled to any notice. (*s*)

As respects the words "DONE IN THE EXECUTION OF HIS "OFFICE," they do not apply to a Justice *illegally* and *knowingly* taking a fee for granting a license. (*t*) But it is established, that unless in the clearest and grossest cases of *wilful* misconduct, the words of the act are to be read as if they were "*bonâ fide under color, or supposed correct execution, of his* "*office;*" for, as frequently observed, if the act had merely

(*s*) *Wright* v. *Horton*, Holt. C. N. P. 458.

(*t*) *Morgan* v. *Palmer*, 2 B. & C. 729; and see *Irving* v. *Wilson*, 4 T. R. 485; *Parsons* v. *Blundy*, Wightw. 22; but if taken by *mistake*, see *Greenaway* v. *Hurd*, 4 T. R. 553; and see *Waterhouse* v. *Keen*, 4 B. & C. 200.

intended to protect magistrates when they *acted strictly* within the scope of their jurisdiction, then the words would be unnecessary, as the magistrate would not then require such protection. (*u*) He is therefore entitled to notice where he has acted upon a subject that arose locally beyond the limits of his jurisdiction; (*v*) or where a statute required the concurrence of *two* Justices, and *one* alone acted; (*w*) and where a lord of a manor was also a Justice, and seized a gun within his own manor, it will be presumed that he acted as Justice, so as to be entitled to a notice. (*x*)

The intended writ must be stated.

As the statute requires notice of the *intended writ*, the notice must state the *name of the writ and of the Court* from which it will be issued; and the subsequent proceeding must correspond; (*y*) and it was decided, that a letter from the plaintiff's attorney, stating that he was instructed to take *legal proceedings*, unless goods were delivered up, was insufficient, although the local act merely required *notice of action*. (*z*) But a slight want of technicality in the name of the writ, as terming it a *precept* (instead of *writ*,) called a *latitat*, will not prejudice. (*a*)

What facts and damage must be stated.

This act expressly requires, that in such notice shall be clearly and explicitly contained, the *cause of action*, which the party hath or claimeth against the Justice; and further enacts, that *no evidence shall be permitted* to be given of any cause of action not contained in the notice; and it will be obvious, that as the object of the statute was to enable the magistrate to know the full extent of the injury complained of, in order that he may tender or pay into Court a sum sufficient to cover every ground of damage, the notice ought to communicate not only the very trespass, or other cause of action, but every ground of special damage intended to be proceeded for; and, at all events, the plaintiff will be confined to the claim expressed in the served notice. It was therefore held, that under a notice of an action of trespass for *seizing goods*, value 2*l*., in plaintiff's dwelling house, he could only recover to that extent for the value of the goods, and nothing for the trespass in the dwelling house; (*b*) and a notice of action for demanding and taking of the plaintiff toll for and in respect of certain things exempted from toll, was too uncertain; (*c*) and even if a particular statute require only

(*u*) *Greenaway* v. *Hurd*, 4 T. R. 555; *Weller* v. *Toke*, 9 East, 364; *Morgan* v. *Palmer*, 2 B. & C. 734; *Cook* v. *Leonard*, 6 B. & C. 351.

(*v*) *Prestidge* v. *Woodman*, 1 B. & C. 12.

(*w*) *Weller* v. *Toke*, 9 East, 364.

(*x*) *Briggs* v. *Evelyn*, 2 H. B. 114.

(*y*) *Taylor* v. *Fenwick*, 7 T. R. 635; *Lovelace* v. *Curry*, id. 631.

(*z*) *Lewis* v. *Smith*, Holt. C. N. P. 27.

(*a*) *Robson* v. *Spearman*, 3 Bar. & Ald. 493.

(*b*) *Stringer* v. *Martyr*, 6 Esp. R. 134.

(*c*) *Freeman* v. *Line*, 2 Chit. R. 673; Lofft's Rep. 58, S. P.

CHAP. II. PROCEEDINGS BETWEEN, &c.

notice of action, without saying *cause* of action, still the notice must state the ground. (*d*) But it has been held, that in stating the cause of action, the same precision and technicality that has been required in pleading, will not be necessary; and that it suffices if there be sufficient cause of action shewn upon the face of the notice, so as to apprise the Justice of what is intended to be proceeded for; and where a local trespass on land is referred to, and the particulars of which might be ascertained by the Justice himself, on view, Mr. J. *Bayley* seems to have considered it sufficient to point the Justice's attention to the general nature of the injury, so that he might go upon the premises and himself ascertain the full extent of the damage. (*e*) Where a notice was of process, "for the said imprisonment and sum of money," and the declaration was for "an assault, BATTERY, and imprisonment," it was held, that at most, the plaintiff was only precluded from recovering any damages for the battery. (*f*)

Recommended form of notice (*g*).

It is, however, recommended, that the notice of action do not only state all the facts complained of, in the order in which they arose, but also the actual damages that resulted, whether they

(*d*) *Towsey* v. *White*, 3 B. & C. 133.

(*e*) *Jones* v. *Bird*, 5 B. & C. 837.

(*f*) *Robson* v. *Spearman*, 3 Bar. & Ald. 493.

Form of notice of an intended action to a Justice for false imprisonment.

(*g*) To *C. D.*, Esquire, acting as one of his Majesty's justices of the peace for the county of ——.

Sir,

I, *A. B.*, of ——, in the county of ——, Esquire, do hereby, according to the form of the statute in such case made and provided, give you notice that I shall, by my attorney, Mr. *E. F.*, of ——, in the county of ——, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a *writ of summons* to be sued out of his Majesty's Court of King's Bench [*or* Common Pleas or Exchequer] at Westminster, against you, at my suit, and proceed thereupon according to law. [Then follows the subject matter of the notice, and which, in case of trespasses *may be* as follows]. For that you the said *C. D.*, on the —— day of ——, A. D. ——, with force and arms, caused me to be assaulted, to wit, at ——, in the county of ——; and also then caused me to be apprehended and seized and laid hold of, and to be forced and compelled to go into, through, and along divers public highways, streets and places, to a certain police office, situate and being at ——, in the county of ——, and to be unlawfully imprisoned and kept and detained in prison, in a certain dark and unwholesome prison or place, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of —— hours, then next following, contrary to the law and custom of this realm, and against the will of me the said *A. B.*; whereby I the said *A. B.* was then not only greatly hurt and injured, but was also thereby greatly exposed and injured in my credit, character and circumstances. And also for that you the said *C. D.*, on the day and year aforesaid, with force and arms, &c. caused another assault to be made upon me the said *A. B.*, to wit, at —— aforesaid, in the county aforesaid, and caused me to be then beat, ill-treated, and apprehended and imprisoned, and kept and detained in prison, without any reasonable or probable cause, for a long time; to wit, for the space of —— hours then next following, contrary to the laws and customs of this realm, and against the will of me the said *A. B.*; and other wrongs to me the said *A. B.* then did, to my damage of 100*l.*, and against the peace of our Lord the now King. Dated this —— day of ——, A. D. ——.

Yours, &c. *A. B.* of ——, in the parish of ——, in the county of ——.

[N. B. To be indorsed as follows:]

"*E. F.*, of No. 10, in —— street, in the town of ——, in the county of ——, attorney for the within named *A. B.*"

were the necessary or natural consequences of the illegal act, and also special and particular damage, however remote, so that in the declaration, and on the trial, the plaintiff may have the fullest latitude in proof and argument to the jury, to increase the damages; and it will, in general, be found most convenient to let the notice be nearly in the form of a *subsequent declaration*, and in effect similar to the subscribed form, (*g*) more especially as no unnecessary technicality can be objected to; (*h*) unless indeed, it should *mislead*. (*i*)

Legal objections need not be noticed.

It seems to be established to be sufficient to state the *facts* complained of, and their prejudicial consequences, without suggesting any *point of law* or *legal ground of objection*, upon which it is intended to be insisted that the conduct of the Justice was illegal. (*k*)

Form of action need not be stated.

It has been expressly decided, that although the name of the *writ* must be stated, still *the form of the action*, as whether it is intended to be trespass, case, trover, or detinue, *need not* be *disclosed;* but that if the *form of action* be unnecessarily stated, and yet be *misdescribed*, and the subsequent declaration vary from the notice, then the latter will be considered insufficient. (*l*) And a notice complaining of a distress, as made under a warrant directed to *A. B.*, when the warrant afterwards appeared to have been directed to *C. D.*, was held a fatal misdescription, because it was calculated to mislead. (*m*)

To whom notice to be addressed, and on whom served.

Although the act requires notice to the *Justice*, of the *intended writ* to be served upon *him*, it has nevertheless been holden in the Court of Exchequer, and on the circuit, that it is not necessary to name in the notice all the parties intended thereafter to be included as defendants in such writ, or to express, where several parties are named in the notice, whether it is intended to sue the Justice and them jointly or severally. (*n*) But where a notice of action was served upon a person who acted as a clerk to two bodies of public officers, and the notice was addressed to him as clerk of *one* body, but the cause of action accrued in respect of something done by the other body, such notice was held insufficient. (*o*)

(*g*) See note (*g*), p. 66.

(*h*) *Gimbert* v. *Coyney*, 1 M'Clel. & Young, 469.

(*i*) *Aked* v. *Stocks*, 1 Moore, & P. 346; 4 Bing. 509.

(*k*) *Rex* v. *Justices of Devon*, 1 M. & S. 412.

(*l*) *Satin* v. *De Burgh*, 2 Campb. 196; *Strickland* v. *Ward*, 7 T. R. 631; 4 M. & Ry. 300, in note; but see Chit. Col. Stat. 647, note (*o*).

(*m*) *Aked* v. *Stocks*, 1 Moore & P. 346; 4 Bing. 509.

(*n*) *Rex* v. *Jones*, 5 Price R. 168; S. P. on Home Circuit, Maidstone, A. D. 1824; and see *Agar* v. *Morgan and others*, 2 Price R. 126; *Jones* v. *Simpson and another*, 1 Tyrw. R. 32; 1 Cromp. & J. 174.

(*o*) *Hiler* v. *Dorrell*, 1 Taunt. 383.

CHAP. II. PROCEEDINGS BETWEEN, &c.

Indorsement on notice of attorney's abode.

The very object of requiring the notice of action was to enable the Justice to know to whom he might apply before the commencement of an action, and tender amends; it was therefore required, that on the *back* of the notice shall be *indorsed* the *name* of the attorney or agent for the intended plaintiff, together with the place of his abode. The 24 Geo. 2, c. 44, does not also require the place of the *plaintiff's* abode to be stated, but only that of the attorney; that being considered sufficient to enable the Justice to go and make a tender. But the Custom and Excise Acts expressly require the abode of the plaintiff to be stated.(*p*) It has been held sufficient if the *surname* of the attorney be stated, although only the initial of his Christian name be given.(*q*) And although acts, in protection of public officers, are generally to be construed strictly, yet it has been holden, that if the name and place of the attorney's abode be stated in the body, it suffices, although the statute, in terms, requires an *indorsement* of the same.(*r*) It usually suffices, to describe the place of abode of the attorney, as generally of a particular town, however considerable, as "*of Birmingham;*" but this does not extend to such a metropolis as London;(*s*) and at least "of London," when the residence was in Westminster, was considered insufficient;(*t*) and certainly the preferable course is to name the number of the house, and the street, and the part of the town where the street lies, when there is the least risk of there being several streets of the same name.

Under the Customs and Excise Acts, which require the place of the intended plaintiff's abode to be stated in the notice, his abode at the time of serving the notice must be stated distinctly; and therefore it was held, that a notice of action against a Custom-house officer for breaking the plaintiff's house in Cable Street, &c., was not a sufficient description of the plaintiff's *then* abode, for he might have removed since the trespass was committed, or he might have had two houses.(*u*)

Other peculiar protections in different statutes.

The constructions upon this principal act are in general equally applicable to all other enactments *in pari materia* and passed with the same object, as in the instance of officers of Customs and Excise, and other public officers; and in doubtful cases, therefore, reference should always be had to such decisions, but with this general *precaution*, that in each particular case every varying

(*p*) See *infra*.

(*q*) *Mayhew* v. *Locke*, 7 Taunt. 63; 2 Marsh. 377, S. C.; and *James* v. *Swift*, 4 B. & Cres. 681.

(*r*) *Crooke* v. *Curry*, Tidd. 9th ed. 30, 7 T. R. 634, in note; *sed quere*.

(*s*) See *Ward* v. *Folliott*, 3 Bos. & Pul. 551; *Stears* v. *Smith*, 6 Esp. R. 138; 6 Bing. 90.

(*t*) *Mills* v. *Collett*, 2 Man. & Ryl. Mag. Cases. 262.

(*u*) *Williams* v. *Burgess*, 3 Taunt. 127.

word in the general or local act, must be particularly examined, in order to ascertain whether it could lead to a conclusion different to that recognised, as relates to the general statute respecting Justices; as for instance, the enactment relating to Justices, requires that the notice of action shall state even the name of the intended process; whereas the statute relating to the Customs, does not perhaps even virtually require that specification. (*u*)

When the month expires.

The act requires "*at least*" one calendar month's notice, and therefore it would seem that the day of service of the notice, and that on which it expires, ought to be excluded, but it has been decided otherwise. (*)

General precautions.

In all cases, where the wrong complained of may, by any possibility, have been committed under color of some local act, great care must be observed to comply with its regulations, as well as those of any general act, before the commencement of any action or other proceeding.

Thirteenthly, notice of attorney or solicitor to opponent, to secure his lien.

In cases where the ability, as well as the probity of the client are doubtful, it is prudent, however unpleasant and obnoxious, to give the defendant an early notice that such attorney requires the latter to pay or give security for the debt and costs to such attorney, and not to his client; nor otherwise to prejudice his general or particular lien; and further requiring that no compromise shall take place, or security be delivered or taken, or arrangement made, unless with the express concurrence of the attorney or solicitor, for otherwise the latter may lose such lien or security; (*v*) and where, no such notice having been given, the plaintiff, pending the suit, compromised it with the defendant without consulting the plaintiff's attorney, it was held, that the latter could not afterwards proceed in the action to recover his costs; (*w*) though it would be otherwise if he could establish that there was an *actual fraudulent* agreement to cheat him of his costs. (*x*) But in general, if after such a notice has been

(*u*) Tidd. Prac. 8th ed. 27; Chitty's Col. Stat. 263, note (*i*), and 646, note (*l*).

(*) In 3 T. R. 623, and 2 Campb. 294, the day of service was included; but see 4 Man. & Ryl. 300, note *b*; 3 B. & Ald. 581; 5 Bing. 339. The *six months* are reckoned *exclusive* of the first day; see *Hardy* v. *Ryle*, 9 B. & Cres. 603, *semble* over-ruling 4 Moore, 465.

(*v*) *Ex parte Hart*, 1 B. & Adolph. 660; *Welsh* v. *Hole*, 1 Dougl. 238; *Read* v. *Dupper*, 6 T. R. 361; *Chapman* v. *Haw*, 1 Taunt. 341.

(*w*) *Graves* v. *Eades*, 5 Taunt. 429; 1 Marsh, 113, S. C.; *Rooke* v. *Wasp*, 5 Bing. 190; 2 Moore & P. 304; *Nelson* v. *Wilson*, 6 Bing. 568; *Charlwood* v. *Berridge*, 1 Esp. R. 345, *accord*. Where the debt has been paid after the commencement of an action, without the costs and without any *express agreement* to give up the costs, the action may in general be proceeded in, if the costs be not paid, after notice of the intention to proceed; *Toms* v. *Powell*, 6 East, 536; 6 Esp. R 40, S. C.; *Cole* v. *Bennett*, 6 Price, 15.

(*x*) *Swain* v. *Levate*, 2 Bos. & P. New Rep. 99; *Graves* v. *Eades*, and *Nelson* v. *Wilson*, *supra*, note (*w*); *Martin* v. *Francis*, 2 B. & Ald. 402; 1 Chit. R. 241, S. C.

given the defendant should pay the plaintiff, he would continue liable to pay the attorney the amount of his lien, (*y*) and a collusive release would be inoperative. (*z*) An exception to this rule seems recently to have been established, where the damages are purely unliquidated, as for an excessive distress, and in which it was held, that provided there was no actual fraud, a release might be effectually given and executed, after notice not to compromise. (*a*) The same rules also prevail in equity; and therefore where a plaintiff's solicitor, with notice, suffered the defendant to make a collateral arrangement for satisfying the plaintiff's demand, without taking effectual security for the payment of his costs, as by suffering his client to take from the defendant his undertaking to the plaintiff, instead of to his solicitor, to pay the costs, the Court would not suffer him to proceed in the suit against the defendant for recovery of them. (*b*)

Fourteenthly, Proceedings of several descriptions, and which to select.

The already enumerated *precautionary measures* having been considered and taken when necessary, and some description of litigation having become necessary, the important question then will be, *which* of several remedies *must* or *should be* preferred. The least hostile is *an arbitration;* the most expeditious and less expensive, *a summary proceeding before Justices;* or in some inferior Court, as of *Requests;* or, lastly, as regards proceedings in Courts of *Common Law, an action;* or in Criminal Courts, a prosecution by *information or indictment.*

With respect to *arbitration*, it is sometimes compulsory, and must be adopted; but it is in general optional, and will be considered in the next chapter. For *small injuries*, whether to the person or to personal or real property, when not indictable, and where the damages do not exceed 5*l*., modern acts enable the party injured to proceed before one or two justices of the peace, though in form rather for punishment than compensation, and leave the party injured the option of proceeding by action. Other statutes punish small offences by pecuniary penalties, the proceeding before justices for which also operates as preventive for the repetition of similar injuries, rather than as private satisfaction. These will be considered in the fourth chapter.

The remedies for *considerable injuries*, or for any injury where an important or *permanent right* is in question, are in

(*y*) *Ex parte Hart*, 1 B. & Adolph. 660; *Welsh* v. *Hole*, 1 Dougl. 238; *Read* v. *Dupper*, 6 T. R. 361; *Chapman* v. *Haw*, 1 Taunt. 341.

(*z*) *Ormerod* v. *Tate*, 1 East, 464; *Gould* v. *Davis*, Cromp. & J. 415; 1 Tyr. 380, S. C.

(*a*) *Ex parte Hart*, 1 B. & Adol. 660, *sed quære*.

(*b*) *Morse* v. *Cooke*, 1 M'Clel. 211; and 13 Price, 473, S. C.

general by *action* in one of the superior Courts, the practical modes of conducting which in the superior Courts will constitute the principal subjects of inquiry in the *Fifth* and subsequent chapters of this part of the work.

We have, in some preceding pages, adverted to the importance of a judicious choice of a remedy proportioned to the nature of the right and of the injury. The intelligence and judgment of an attorney cannot be more strikingly evinced than in this part of his professional conduct. (c)

Fifteenthly, Retaining Counsel.

Immediately after it has been resolved that proceedings by and against certain parties shall be instituted in any particular Court, and where there is a probability of a trial or hearing on any particular circuit, or at any particular sessions, it is the duty of the attorney to consult with his client as to the counsel to be retained on his behalf, and which should be effected without the *least delay*, so as not to be anticipated by the opponent. (d) Such counsel should be retained who will be certain to attend at the place of trial or hearing, (e) and whose knowledge and experience, either generally or on the particular subject, will render them most able to conduct the cause. In choosing counsel, care must be observed that their interest or particular opinions are not calculated to interfere with the interest of the client. In general, when there is a strong preponderance of law and fact in favour of the client, his cause would probably succeed, whoever may conduct it; but unquestionably where the merits are nearly balanced, the weight of superior talent of a particular counsel would probably turn the scale; and therefore it is always the duty of the attorney, in every cause that will be substantially defended, to secure the best counsel. In causes of any difficulty, and where there are two or more witnesses for the party on whose behalf the brief is to be delivered, briefs even to three counsel may be allowed on the taxation of costs between party and party, and sometimes there should be as many retainers. (f)

(c) *Ante,* 1 Vol. 15 to 31, as to the choice of one of several proceedings, and in particular, page 23, as to actions in the Superior Courts for small injuries.

(d) In prudence, where resistance is anticipated, counsel should be retained, even before the plaintiff's attorney has written his letter to the defendant, as advised in the following section.

(e) Before retaining counsel, it should be resolved in which *Court* the action is to be brought, and in what county the *venue* will be laid, and the cause *tried*, and in which Court a motion for a *new trial* would be made; and it should be well considered whether the leading counsel will attend on each occasion; see *post*, "*Venue.*"

(f) 1 Chitty's R. 544; Tidd, 9th ed. 799. See regulations in Equity, 5 Russell R. 23.

But in taxing costs only the retainer of the leading counsel is allowed against the opponent, it being considered most probable that abundant counsel will be found upon the circuit or sessions competent as juniors, and that therefore there could be no absolute occasion for retaining more than a leader. When on behalf of an expected plaintiff or defendant it is not quite certain who will be the exact parties, it is usual to deliver a *general* retainer, which secures the counsel for the client in all matters that may arise during the life of the party on whose behalf it is given, so that he do not omit to offer to the counsel retained a brief in every case where he could hold the same. But the cost of a general retainer is never allowed on taxation between party and party.

CHAPTER III.

OF REFERENCES TO ARBITRATION, AND PROCEEDINGS THEREON. (a)

First, PRELIMINARY OBSERVATIONS.
When a reference proper. - 73
When not - - - 75
Secondly, Who may refer - - 77
Thirdly, Utility of reference and award to obtain opinion of Court 78
Fourthly, Distinctions between references at *Common Law* and under the *Statutes* - - - 79
Fifthly, Who to be the arbitrator or umpire - - - 83
How to act if arbitrator refuse to proceed - - 84
Sixthly, THE PRACTICE AND LAW 85
1. Terms of submission - 85
No amendment of, when 89
2. Affidavit of execution of submission - - - 91
3. Making submission rule of Court - - - 92
4. Appointment of umpire - 93
5. Meetings before arbitrator - 94
6. Enlargement of time - 96
7. Proceedings before arbitrator 97
8. Enforcing attendance of witnesses, &c. - - 98
9. Arbitrators swearing witnesses - - - 100
10. Examination of witnesses, &c. - - - 101
11. Mode of taking the evidence - - - 102
12. Of revocations - - 102
13. Of the award - - 105
14. Of certificates - - 112
15. Of setting aside award - 116
16. Of enforcing award - 122
17. Jurisdiction in equity - 124
18. Of awards under particular statutes - - - 125

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

First, PRELIMINARY OBSERVATIONS as to *References* to *Arbitration*, and when, and under what circumstances, they are expedient.

HOWEVER imperfect and objectionable may be the mode of deciding upon *facts* by a *jury*, it seems difficult to suggest a more satisfactory tribunal. The best informed individuals so frequently differ in opinion upon questions of fact, and even upon the clearest questions of ethics, that we cannot ever anticipate a certain just and correct decision upon any subject, by *one* or *two* individuals, even admitting that they are free from prejudice and from indulgence of resentment, and are, in every sense of that term, just; and hence, men naturally prefer an open trial by jury, with the chance of a new trial, and of an appeal to a superior tribunal, to a private decision by an arbitrator. If the justice of this reason be doubted, let any one read the reports of the decisions, even of the Superior Judges, and especially those relating to *criminal cases*, where each

(a) See a clear practical summary, Tidd's Practice, 9th ed. 819 to 846; see in general Kyd on Awards; Caldwell on Arbitrations; Watson on Arbitration; 2 Madd. Ch. Prac.; Com. Dig.; and Bac. Abr. tit. Arbitrement; 3 Chitty's Com. Law, 68, 637 to 667. It is singular that many of the principles of the law of nations, in Vattel. Law Nat. 274 to 289, will be found applicable.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

Judge is necessarily most anxious to decide for the best; and where it will be found, that not unfrequently, upon apparently easy questions, eight will be of one opinion and seven of another.(c) Besides, if the proposed arbitrator have not had a *professional education*, he will be insufficiently acquainted with the principles of law and of evidence, and will consequently frequently err, even if wholly uninfluenced by any unjust partiality or prejudice; and if he be a *Barrister*, he will probably not have had great experience, because those who are in great practice cannot spare the time to devote several *continuous* hours, as is essential to a *speedy* conclusion of a reference, and numerous meetings frequently adjourned to distant periods, and perhaps of not two hours' duration, and attended by counsel on each side, are even more expensive than a trial. It is therefore a natural desire of litigating parties not to trust their case to the decision of a single arbitrator, or even of three; for if *Judges* will doubt, and sometimes misapprehend the law or the facts, what confidence can be justly reposed in the opinions of men naturally supposed to be of inferior talent. As, therefore, *trial by jury* has long been considered every Englishman's birthright, it is not surprising that hitherto any attempt generally to take away that right, and *force* arbitration, even under the recommendation of a Judge, has been unsuccessful. (d)

The principal instances of successful attempts to *compel* arbitrations, will be found in the *Friendly Society* Act, (e) and the *Saving Bank* Act, (f) and those relating to *Labourers* and *Servants* in certain trades; (g) in regard to which, respectively, acts have been passed prescribing that remedy. So, disputes respecting *Seamen's wages* were to be awarded upon, or settled by, a magistrate; (h) and certain claims for *Salvage* are to be settled by the award of magistrates. (i) The *first class* of these cases relates to persons little able to sustain the expense of formal litigation; and, therefore, it was even mercy to them to *compel* them to adopt a summary mode of settling the dispute; and as to *salvage*, as *ships* might be detained whilst

(c) See Russ. & Ry. Crown Cases; Moody's Cases, *per tot*. As upon a question whether an *outbuilding* is part of a dwelling-house: whether there can be a *wound* without the continuity of the skin being broken; *Burrow's case*, Mood. C. C. 274; *Wood's case*, id. 278.

(d) *Ante*, 1 Vol. 21, 22.

(e) 10 Geo. 4. c. 56. sect. 27.

(f) See former Saving Bank Act, 9 Geo. 4, c. 92, sect. 45; *Crisp* v. *Bunbury*, 8 Bing. 394; shewing, that in such case no *action* can be supported: and see the present Act, 10 Geo. 4, c. 56.

(g) 5 Geo. 4, c. 96; and see Burn. J. tit. Servant.

(h) 59 Geo. 3, c. 58; *Minerva*, 1 Hagg. Rep. 54.

(i) 1 & 2 Geo. 4, c. 75; *Jonge Nicholaas*, 1 Hagg. 201.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

a formal suit in the Admiralty was deciding, a more expeditious remedy for the service became essential for the interests of shipping and commerce.

When a reference is proper.

The instances in which an arbitration *should be adopted*, in preference to any litigation, are principally those, when from the very nature of the subject, it would ultimately, by a judge and jury, be properly considered a case *unfit to be tried* in Court, as in cases of long and intricate accounts; and where, to obtain a clear understanding, it would be necessary to refer to numerous documents, and make or explain calculations, and through which each of the twelve jurors in the jury box could not conveniently proceed, so as to form his own judgment. In such and the like cases, even days might be consumed on a trial, without even the probability of the jury arriving at a just conclusion, and the party persisting in a formal trial would inevitably so predispose a jury against him as probably to suffer in the result. In such a case, the whole cause should be referred, in the *first instance*, or the party should agree to refer the matters of figure, and try the cause upon one or more distinct points of fact that may be readily, and within a convenient time, disposed of by the jury. Thus consenting to relieve the jury from too embarrassing an investigation, they will perceive that the parties are disposed to try the cause fairly, and will, consequently, give the single disputed point full and just consideration. Other cases fit to be referred, are frequently those where it would be impracticable or difficult to collect or keep together several witnesses, so as to attend upon a fixed day at Nisi Prius; or disputes between neighbours, respecting supposed nuisances by buildings or otherwise, to ancient lights or watercourses, ways or other property, where not only the rights of the parties may be referred, and the damages, but also the question whether, upon any and what terms, and subject to what modifications, the alleged nuisance shall or not be continued. So, as an award upon a title to land is binding on all the parties, it would be proper in questions of right to small property, to refer the matter to some competent person.(*k*) So, subjects of delicacy, unfit to be exposed to public investigation, especially between near relations, should be referred, unless some injury to character has been occasioned.

When a reference is improper.

But, on the other hand, in cases of calumny, requiring *public contradiction*, or open apology, it would not be proper to refer to arbitration; nor should a claim for compensation for *Crimi-*

(*k*) *Doe* v. *Russen*, 3 East, 11; *Prosser* v. *Goringe*, 3 Taunt. 426.

nal Conversation be so referred, because the House of Lords require the verdict of a jury antecedent to a divorce *a vinculo matrimonii*. If, however, the husband have no intention to seek such a divorce, a reference may be made. (*l*) We have seen, in a preceding page, that in general matters of a *criminal nature* cannot be legally or effectually referred to arbitration, unless by permission of the Court. (*m*) Again, when one or more witnesses to an important fact would require strict cross examination in public, before a judge and jury, so as to elicit truth, it might be dangerous to refer to arbitration, when the witnesses, if so disposed, would probably swear without apprehension of consequences. So, where sureties, or bail in an action or replevin suit, are responsible, a reference, without their concurrence, will, in some cases, although not in all, discharge them from liability. (*n*)

Not when a defence is *stricti juris*, unless under qualified terms.

When the plaintiff or defendant resolves to stand upon some strict *legal* right or objection that may not accord with the equity or justice of the case, then it would be injudicious to refer, at least without expressly stipulating that if any legal objection, either to the evidence or to the result, should be taken, then absolutely, the party *shall have* the benefit of it, and *negatively*, that it *shall not* be in the discretion of the arbitrator to deny effect to it; for, unless expressly controlled in this respect, some arbitrators will exclude a legal ground of defence, such as usury, (*o*) or a forfeiture between landlord and tenant, and make their award according to what they consider is the justice of the case; and such award would, unless *expressly provided* otherwise, be sustained, and consequently the client prejudiced. (*p*) In such a case, the submission and rule of Court must be express; not that the arbitrator shall be at *liberty* to state the facts or objections specially, but that he *shall state* the same, if requested by the party, so as to be *peremptorily* compulsory upon him; and even then, sometimes he might come to a conclusion, that no legal objection was raised by *the evidence;* so that in each particular case, it will be essential to be cautious in the terms of the reference. (*q*)

(*l*) *Soilleux* v. *Herbst*, 2 Bos. & Pul. 444.

(*m*) *Ante*, 1 Vol. 17, and 1 Nev. & Man. 275.

(*n*) *Archer* v. *Hale*, 4 Bing. 464; *Aldridge* v. *Harper*, 10 Bing. 118.

(*o*) *Delver* v. *Barnes*, 1 Taunt. 48, and other cases in next note, 6 Taunt. 254.

(*p*) Per Lord Thurlow, in *Knox* v. *Simmonds*, 1 Ves. 369; per Holroyd, J. in *Richardson* v. *Nourse*, 3 B. & Ald. 240; *Wohlenburgh* v. *Lageman*, 6 Taunt. 254; *Price* v. *Hollis*, 1 Maule & S. 105; *Boutilleg* v. *Thick*, 1 Dow. & Ry. 366; *Cramp* v. *Symons*, 7 J. B. Moore, 434; 1 Bing. 104, S. C.; *Wood* v. *Griffith*, 1 Swanst. 59; *Ainsley* v. *Goff*, Kyd on Awards, 351; and Watson on Arbitration, 162.

(*q*) See form, *post*, 87, 88, 90.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

Secondly, who may refer.

Secondly, who may refer. An INFANT or *married woman*, cannot effectually refer to arbitration; and, although in general the party contracting with them would be bound to perform his part of the contract, there are exceptions to that rule as respects references, on account of the want of mutuality. (*r*) One of several PARTNERS may bind himself, but not the others, by his submission, even of matters arising out of the business of the firm. (*s*) With respect to AGENTS, in general, they must have *express* power to refer; but a power of attorney, "to act "on his behalf in dissolving a partnership, with authority to "appoint any other person as he might think fit," authorizes the agent to submit the accounts to arbitration. (*t*) At law, a *Counsel* or *Attorney* may bind his client by his consent to an order of Nisi Prius, referring a particular case; nor will the Court allow the party to avoid the reference upon affidavit that it was wholly against his will, or even express prohibition. (*u*) And an attorney has equal power to consent to an enlargement of the time for making the award. (*v*) But it was held, in an old case, that *in equity* a *solicitor* cannot bind his client by agreement to refer, without express authority. (*w*) Nor at law, should counsel or an attorney take upon himself to refer a cause unless he have express authority or direction to act generally for the best, or the client refuses to communicate upon the subject; in either of which cases, he would be justified in acting according to the best of his judgment. The prudent course is always to have the client in Court, and let him decide for himself.

By executors, assignees, &c.

Executors, we have seen, should not, when claimants, refer to arbitration without the concurrence of creditors, legatees, and next of kin. (*x*) When defendants, they would incur the risk of an award, subjecting them personally to liability, unless by the terms of the reference the power so to award be carefully guarded against (*y*) *Assignees* of a bankrupt (*z*) or of an

(*r*) *Biddle* v. *Dowse*, 6 B. & Cres. 255, overruling *Dowse* v. *Coxe*, 3 Bing. 20, as to infants; and *ante*, 1 Vol. 825.

(*s*) *Stead* v. *Salt*, 3 Bing. 101 and 500; 4 J. B. Moore, 340; *Strangford* v. *Green*, 2 Mood 228; *Mudy* v. *Osain*, Litt. Rep. 30; 15 East, 209.

(*t*) *Healey* v. *Stoker*, 8 B. & Cres. 16; and see Dyer, 216, b; *Cayhill* v. *Fitzgerald*, 1 Wils. 25, 58. The agent, in such a case, must take care that the submission do not make him personally liable; *Bacon* v. *Dubarry*, 1 Lord Raym. 246; and see, as to an agent's power, *Godson* v. *Brooke*, 4 Campb. 163; 3 Taunt. 486, 378; 1 M. & S. 719.

(*u*) *Filmer* v. *Delbar*, 3 Taunt. 486, 1 Salk. 86; 1 Chit. R. 193, *accord;* 5 Taunt. 628; but see 6 B. & Cres. 255, and Tidd, 9th ed. 820.

(*v*) *Rex* v. *Hill*, 7 Price, 644.

(*w*) *Colwell* v. *Child*, 1 Chan. Cas. 86; 1 Chan. R. 104; Chit. Eq. Dig. Solicitor and Client, 1238. *sed quære.*

(*x*) *Ante*, 1 Vol. 532; see notes, Bac. Ab.; Arbit. C.; Com. Dig. Administration, L. I. and Assets, C.

(*y*) *Pearson* v. *Henry*, 5 T. R. 6; *Barry* v. *Rush*, 1 T. R. 691; *Worthington* v. *Barlow*, 7 T. R. 453; 4 Dow. & Ry. 814; *Robson* v. ———. 2 Rose, 50; and *in matter of Joseph and Webster*, 1 Russ. & M. 496. *Post*, 91, form.

(*z*) 6 Geo. 4, c. 16, s. 88; 1 & 2 W. 4, c. 56, s. 43.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

insolvent debtor are expressly prohibited from referring to arbitration, unless with the consent of the major part in value of creditors present at a duly convened meeting, or of the commissioners testified in writing, in case less than one-third in value of the creditors should neglect to attend; (*a*) and there is a provision nearly to the same effect in the General Insolvent Act. (*b*) But Assignees and Trustees should, in their submission to reference, expressly guard against personal liability, the same as executors, or they may be personally liable. (*c*)

Thirdly, suggested utility of a reference to find facts for the opinion of the Court.

In aid of an object recently declared by the Legislature to be conducive to SPEEDY *justice* and *diminution of expense*, arbitrations may with propriety be greatly extended in practice, viz. *by having the facts stated concisely by the arbitrator, and then obtaining the opinion of the Court thereon without the expense of pleadings or trial.* The recent acts for the further amendment of the law enable parties to any action or information, *but not until after issue joined*, by consent and by order of any of the Judges of the superior Courts, to state the facts of the case in the form of a SPECIAL CASE for the opinion of the Court, (but without the power of feigning a *special verdict*) and to agree that a judgment shall be entered for the plaintiff or defendant by confession or of *nolle prosequi* immediately after the decision of the case, or otherwise, as the Court might think fit. (*d*) Before that enactment, no such special case could be stated until after the expense of a trial had been incurred, and it was considered culpable in any practitioner even to attempt to obtain the opinion of the Court by a *pretended special case.* (*e*) But at all times since the statute 9 & 10 W. 3, c. 15, or when a submission has been made a rule of Court, an *award* may find facts specially, subject to the opinion of the Court, and who will, after argument, determine upon the same; (*f*) and consequently, *before issue joined*, and before even the commencement of an action, parties may, by any memorandum in writing, submit their differences to arbitration, with an express clause that such submission *shall* be made a rule of Court, and that the arbitrator *shall* by his award find the facts, and state any objection or point of law arising upon the evidence

(*a*) 6 Geo. 4, c. 16, s. 88; and 1 & 2 W. 4. c 56, s. 43.

(*b*) 7 Geo. 4, c. 57, s. 24.

(*c*) *Robson* v. ——, 2 Rose's Bankruptcy Cases, 50. As to *Trustees*, see *in re Wansborough*, 2 Chit. R. 41; *post*, 91; but see Tidd, 836, *semble contra.*

(*d*) 3 & 4. W. 4. c. 42, s. 25.

(*e*) *Re Elsam*, 3 B. & Cres. 597.

(*f*) *Aubert* v. *Maze*, 2 Bos. & Pul. 372, where the Court approved of the course taken to state the facts for the opinion of the Court; and see the form presently stated; see also *Ames* v. *Milward*, 8 Taunt. 637; 2 J. B. Moore, 713, S. C.; *In re Webb*, 8 Taunt. 443; 2 J. B. Moore, 500, S. C.

specially, and make his award, so that the opinion of the Court may be thereupon obtained without the expense of any process or pleadings; and such a proceeding is strongly recommended to parties, who may justly repose confidence in a barrister's faithfully stating the facts with his opinion, subject to the decision of the four Judges, although they might not choose to be bound by the opinion of any single individual.

Fourthly, distinctions between references at Common Law, and under the statutes.

Fourthly, agreements to refer to arbitration are either at *common law* or under the *statutes* 9 & 10 W. 3, c. 15, and 1 & 2 W. 4, c. 42, s. 39, 40 & 41. Those at common law may be either verbal, or in writing not under seal, or by specialty, either bond or covenant, or by a rule or order of a Judge of the Court in which an action is depending, and which was not unfrequent even before the above first enactment.

An award, when made before revocation, was equally binding upon the parties at *common law*, whether it were made under a verbal or written authority. And it has been recently decided, that an award so far changes the nature of an original claim, when for *unliquidated damages*, that it precludes a party previously entitled to sue for the same from afterwards so doing, and compels him to confine his remedy to an action for the non-observance of the award; and therefore it was held, that in an action for *unliquidated damages*, or in trespass for damages, a plea of a reference and award is a valid answer, without averring performance of the award; but that in an action of *indebitatus assumpsit* for tolls or any other *debt*, a plea of a reference and umpirage to pay 13*l.* is insufficient, unless it aver performance by payment of the sum awarded; for in the latter case the original demand being for a debt, the award only fixed the amount, and the plaintiff was at liberty to sue either for the original debt or upon the award; and in the former case, to treat the debt as still for tolls, and produce the award in evidence of the just amount of his claim.(*g*)

But it is settled at common law, that unless the parties be bound by submission made a rule of Court, they may, if no arbitrators have been named, refuse to appoint them, although they have expressly covenanted to refer to arbitration; (*h*) or may at any time before an award has been made, countermand the arbitrator's authority, so as to render a subsequent award

(*g*) *Allen* v. *Miller*, 2 Cromp. & Jer. 47; 2 Tyrw. R. 113.

(*h*) *Kill* v. *Holster*, 1 Wils. 129; *Thompson* v. *Charnock*, 8 T. R. 139; *Street* v. *Rigby*, 6 Ves. 815, 821; 2 Ves. J. 136.

after notice of the revocation *a nullity*; (*i*) and the agreement to refer is no bar to an action at law or suit in equity; (*k*) and although an action *may certainly be supported* for the breach of the agreement to refer, (*k*) yet the damages therein might be merely nominal, and not equivalent to the sum that might have been awarded, unless indeed there has been a very explicit agreement, as is advisable, to pay a named sum equal to the sum claimed as *stipulated damages*, and not as a penalty; (*l*) and we have seen that in general a Court of Equity will not compel specific performance of a covenant to refer. (*m*)

The obligation and effect of an arbitration, in pursuance of the statutes 9 & 10 W. 3, and 3 & 4 W. 4, c. 42. s. 39, 40, 41.

Hence when parties considered it probable that an arbitration would turn out unfavourable, they refused to appoint arbitrators; or when appointed, revoked their authority. To remedy these defects, the *statutes* now to be considered were passed, which, especially the recent act, take away the power of revocation where the reference has been by submission to be made a rule of Court, or under a rule of Court or Judge's order, or order of *Nisi Prius*, in the first instance, and requires the arbitrator to proceed *ex parte*, and compels the attendance of witnesses, and subjects them to an indictment for perjury if they swear falsely. (*n*) But still, where the deed or agreement, as frequently has occurred in partnership deeds, does not contain any stipulation that the covenant to refer shall be made a rule of Court, there is no perfect mode of enforcing the covenant,—a defect which should be guarded against in future stipulations of that nature. When, however, a proceeding by arbitration and award is enjoined by a *public act*, then it may be enforced by *mandamus*; (*o*) and if an act direct that a claim shall be adjusted only by reference and award, the party proceeding by action would fail. (*p*)

The enactments in 9 & 10 W. 3, c. 15.

The statute 9 & 10 W. 3, c. 15, intituled "An Act for determining Differences by Arbitration," recites that "it has been

(*i*) *Marsh* v. *Bulteel*, 5 B. & Ald. 507; 2 Chitty's R. 316; *Aston* v. *George*, 2 B. & Ald. 395; 2 Saund. 133, d.

(*k*) In *Tattersal* v. *Groote*, 2 Bos. & Pul. 131, it seems to have been doubted whether an action could be supported for refusing to refer according to covenant, *unless it appeared that there was a fair subject of arbitration*; but undoubtedly such an action might be sustained, and sometimes efficiently, so as to recover an equivalent in damages to the full extent of what it can be shewn would have been awarded; and see 2 Keb. 10, 20, 24; *Charnley* v. *Winstanley*, 5 East, 266; see suggestions of Parke, J. in 10 B. & Cres. 484; 5 Taunt. 453; Tidd, 9th ed. 824. Suppose a *surety* joined in the covenant to refer, and his principal refused to proceed, there can be no doubt that the surety would be liable to pay to the full extent of the sum which it can be shewn would, or ought to have been awarded in case the arbitrators had proceeded.

(*l*) As to stipulated damages, *ante*, 872, see the suggested form in note (*q*), *post*, 92.

(*m*) *Ante*, 1 Vol. 851, 2, 829 to 831.

(*n*) 3 & 4 W. 4, c. 42, s. 39, 40, 41.

(*o*) *Ante*, 1 Vol. 702; *Re Washbrooke*, 7 Dowl. & R. 221.

(*p*) *Crisp* v. *Bunbury*, 8 Bing. 394.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

" found by experience that references made by rule of Court " have contributed much to the ease of the subject in determin- " ing of controversies, because the parties become thereby ob- " liged to submit to the award of arbitrators, under the penalty " of imprisonment for their contempt in case they refuse sub- " mission: Now for promoting trade and rendering the awards " of arbitrators the more effectual in all cases for the final " determination of controversies referred to them by merchants " and traders and others concerning matters of account or " trade, or other matters, it is enacted; That it shall and may " be lawful for all merchants and traders, and others desiring " to end any controversy, suit or quarrel, controversies, suits or quarrels, for which there is no other remedy but by personal " action or suit in equity, by arbitration to agree *that their sub-* " *mission* of their suit to the award or umpirage of any person or " persons *should be made a rule of any of His Majesty's Courts* " *of Record* which the parties shall choose, and to *insert such* " *their agreement in their submission*, or the condition of the " bond or promise whereby they oblige themselves respectively " to submit to the award or umpirage of any person or persons, " which agreement being so made and inserted in their sub- " mission or promise or condition of their respective bonds, " shall or may, upon producing an affidavit thereof made by " the witnesses thereunto, or any one of them, in the Court of " which the same is agreed to be made a rule, and reading and " filing the said affidavit in Court, be entered of record in such " Court, and a rule shall thereupon be made by the said Court " that the parties shall submit to and finally be concluded " by the arbitration or umpirage which shall be made concern- " ing them by the arbitrators or umpire pursuant to such sub- " mission: And in case of disobedience to such arbitration or " umpirage, the party neglecting or refusing to perform and " execute the same, or any part thereof, shall be subject to all " the penalties of contemning a rule of Court where he is a " suitor or defendant in such Court, and the Court, on motion, " shall issue process accordingly, which process shall not be " stopped or delayed in its execution by any order, rule, com- " mand or process of any other Court, either of law or equity, un- " less it shall be made appear *on oath* to such Court *that the* " *arbitrators or umpire misbehaved themselves*, and that such " award, arbitration or umpirage was procured by *corruption* or " *other undue* means."

The second section enacts, "That any arbitration or umpirage " procured by corruption or undue means shall be judged and

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

"esteemed void and of none effect, and accordingly be set aside "by any Court of Law or Equity, so as complaint of such corruption or undue practice be made in the Court where the "rule is made for submission to such arbitration or umpirage "*before the last day of the next term after such arbitration or* "*umpirage made* and published to the parties."

The enactments in 3 & 4 W. 4, c. 42. s. 39, 40, 41.

The 3 & 4 W. 4, c. 42, s. 39, after reciting "that it is expedient to render references to arbitration more effectual," enacts, that the power and authority "of any arbitrator or umpire "appointed by or in pursuance of any rule of Court, or judge's "order, or order of Nisi Prius, in any action now brought, or "which shall be hereafter brought, or by or in pursuance of "*any submission to reference containing an agreement that* "*such submission shall be made a rule* of any of his Majesty's "Courts of Record, shall *not be revocable by any party* to such "reference, without the leave of the Court, by which such rule "or order shall be made, or which shall be mentioned in such "submission, or by leave of a Judge; and the arbitrator or "umpire shall and may, and is *hereby required* to proceed with "the reference, notwithstanding any such revocation, and to "make such award, although the person making such revocation "shall not afterwards attend the reference; and that the Court "or any Judge thereof, may, from time to time, enlarge the "term for any such arbitrator making his award."

Section 40 enacts, "that when any reference shall have been "made by any such rule or order as aforesaid, or by *any sub-* "*mission containing such agreement as aforesaid*, it shall be "lawful for the Court by which such rule or order shall be "made, or which shall be mentioned in such agreement; or for "any Judge, by rule or order to be made for that purpose, to "*command the attendance and examination of any person* to "be named, or the production of any documents to be men- "tioned in such rule or order; and the disobedience to any "such rule or order shall be deemed a contempt of Court, if in "addition to the service of such rule or order, *an appointment* "of the time and place of attendance in obedience thereto, "*signed by one at least of the arbitrators*, or by the umpire "before whom the attendance is required, shall also be served, "either together with or after the service of such rule or order; "provided always, that every person whose attendance shall be "so required, shall be entitled to the like conduct money and "payment of expenses, and for loss of time, as for and upon "attendance at any trial: Provided also, that the application "made to such Court or Judge, for such rule or order, shall set

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

" forth the county where such witness is residing at the time, " or satisfy such Court or Judge that such person cannot be " found: Provided also, that no person shall be compelled to " produce under any such rule or order, any writing or other " document that he would not be compelled to produce upon a " trial, or to attend at more than two consecutive days, to be " named in such order."

Section 41 enacts, that " when in any rule or order of refer- " ence, or in any *submission to arbitration containing an agree- " ment that the submission shall be made a rule of Court,* it " shall be ordered or agreed that the witnesses upon such refer- " ence shall be *examined upon oath*, it shall be lawful for the " arbitrator or umpire, or any one arbitrator, and he or they " are hereby authorised and required to administer an oath to " such witnesses, or to take their affirmation in cases where " affirmation is allowed by law, instead of oath; and if upon " such oath or affirmation, any person making the same shall " wilfully and corruptly give any false evidence, every person so " offending, shall be deemed and taken to be guilty of *perjury*, " and shall be prosecuted and punished accordingly."

Fifthly, Who to be THE ARBITRATOR or Arbitrators.

In selecting an arbitrator, it is scarcely necessary to suggest, that he should be free from interest or even bias, and in general not a near relative, not merely from any apprehension that he would award in favour of his interest or relative, but to avoid the converse; for sometimes the desire to avoid any supposed partiality will too strongly influence an honourable mind in deciding to the contrary. With respect to direct interest, if the parties, fully aware of the objection, constitute a party so interested their arbitrator, they will be bound by his decision; as where Mr. Sergeant Hards, by rule of Court at the assizes, referred a question of deodand of a horse, which he claimed, to the Archbishop of Canterbury, who was the owner, and who awarded against the Sergeant, and the Court refused to interfere; (q) although it would have been otherwise if the Archbishop had been a judge constituted by legal authority, and the parties had not been aware of the interest of the arbitrator; (r) because one of the great ends of the institution of civil society is to prevent men from being judges in cases wherein they are concerned, and to remit the decisions of adverse in-

(q) See *Matthew* v. *Ollerton*, 4 Mod. 226; Comb. 218; Hard, 44; and see 3 Bla. Com. 299; Hob. 87.

(r) Id. ibid.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

terests to those *who can have no interest in the* determination of any such cases. (s)

If the question in dispute be entirely matter of account, or a question of damages, then proper valuers may be appointed; but in general, as it is difficult to anticipate that some question of law, either as respects the admissibility of evidence or otherwise, will not arise, it has been found that a reference to a barrister is more certain and satisfactory; for he may hear and be properly *influenced* upon all questions of value, by competent witnesses, although he could not delegate his decision to a third person, (t) and he will be ready at all times to decide on the propriety of admitting the evidence; and his very habit of attending courts of justice, will better enable him to decide upon all questions of general reasoning, with more facility and correctness than most other individuals.

It has been suggested by a very sensible and generally accurate author, that as regards the power of compelling the attendance of witnesses, the expression in the 40th section of 3 & 4 W. 4, c. 42, "signed by one at least of the arbitrators, "or by the umpire," would import that such power did not apply where there is only one arbitrator; (u) and if so, it would be prudent to appoint at least *two* arbitrators with an umpire; but it is submitted that the enactment clearly extends to the case of a single arbitrator. (v)

Precautionary provisions for another arbitrator.

When time will allow, it is always advisable, before the agreement or rule or order of reference is concluded, to ascertain whether the arbitrator will accept the office, or at least to provide for the contingency, by specifying, "or his nominee or "nominees, until an award has been perfected;" or "such "other person as shall be appointed in that behalf by the said "Court or any Judge thereof." This is essential, because it has been held that the condition of a recognizance to abide the award of D. cannot be varied by a rule of Court substituting M. for D.; (w) and although the difficulty might unquestionably be remedied by a new agreement of reference, it frequently occurs, that at a subsequent time one of the parties will not concur.

How to act if arbitrator refuse to proceed.

In case the appointed arbitrator should refuse to accept the reference, or at any time refuse to proceed further, then unless

(s) Per Lord Stowell, in case of *Two Friends*, 1 Rob. Rep. 282.

(t) *Hopcroft* v. *Hickman*, 2 Sim. & Stu. 130; *ante*, 1 Vol. 830.

(u) Mr. Theobald's observations on the act 3 & 4 W. 4, c. 42; and Legal Observer for October, 1833, p. 492.

(v) See also section 41, which speaks of only *one* arbitrator, or of several, as regards the swearing a witness.

(w) *Rex* v. *Bingham*, 1 Cromp. & J. 245.

the appointment of another arbitrator has been provided for, as suggested, the only course will be to proceed in the action or prosecution as if no reference had taken place; (*x*) and the Court of Chancery has refused to compel an arbitrator to proceed, although he had accepted the reference, and in part heard the case. (*y*) But where a verdict has been taken subject to a question of law, and the damages to be settled by a named barrister, and the Court had decided the question of law in favour of the plaintiff, and the barrister afterwards refused to assess the damages, because he had advised for one of the parties, and one of the defendants refused to consent to the appointment of another barrister; the Court on motion ordered that the plaintiff should be at liberty to issue execution for the sum found by the verdict, unless the defendant would consent to refer to another arbitrator within a named time. (*z*) And when a verdict has been taken absolutely for the plaintiff, and the amount of damages only referred, the Court have supplied a defect attributable to accident, and allowed execution for the amount of the verdict, unless the defendant will consent to a completion of the reference. (*a*) But in general, where a reference has become abortive without fault of the defendant, the Court will not assent; and if he refuse to consent to a perfect appointment of an arbitrator, the only course is to proceed in the cause, unless the appointment of a fresh arbitrator has been originally provided for.

Sixthly, the PRACTICE AND LAW.

Having resolved upon an arbitration and an arbitrator, the next consideration is the practical mode of conducting it, and which may be arranged under the following heads:—1. The submission. 2. The affidavit of its execution. 3. Of making the submission a rule of Court. 4. The arbitrator's appointment of another arbitrator or umpire. 5. Of the meetings before the arbitrator, and his written appointment thereof—notices thereof.—6. Enlargement of time.—7. Proceedings before the arbitrator, &c., including the examination of witnesses and evidence, and of the parties. Of revocations in fact or law. Of the award and its publication, and the subsequent proceedings to set aside or enforce the award.

1st, The terms of the Submission.

The terms of submission or reference, whether by agreement, bond, deed, order, or rule of Court, require more care than has been usually observed; and they should be considered

(*x*) *Crawley* v. *Collins*, 1 Wils. Ch. C. 31; 3 Swanst. 90.

(*y*) 3 Swans. 90; 2 Mad. Ch. Prac. 713.

(*z*) *Wolley* v. *Kelly and others*, 1 B. & Cres. 68.

(*a*) *Taylor* v. *Gregory*, 2 B. & Adol. 774.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

even before they will be proposed in Court, especially when the party interested would wish any deviation from what are called "*the usual terms*," which, at *Nisi Prius*, are a reference of "the cause and all matters in difference (or the former alone) "on the *usual terms*," which means, that the costs of the cause shall abide the event, and that the costs of the reference and award shall be in the discretion of the arbitrator; and in special jury causes it is usual to provide expressly "that the costs of "the special jury shall be in the discretion of the arbitrator." The terms "abiding the event" mean, that if the arbitrator shall award that the *verdict* shall be for the plaintiff, then he shall have the costs of the action, and *vice versâ* as regards the defendant; and that as regards the costs of the reference and the award, the arbitrator may direct either party to pay the whole, or each pay half; or, to avoid the trouble and expense of taxation, that each party shall bear and defray his own costs of the reference, and pay half the expenses of the arbitrator and of his award. In general, when the plaintiff or defendant was clearly right in his proceeding or resistance of the claim, it would follow that he should be entirely indemnified from any expenses, by awarding that the whole shall be paid by the opponent. But where each party has been in a degree to blame, as by suffering accounts to become intricate, or by unnecessarily delaying or increasing the expenses of the arbitration, then with propriety each party ought to bear a proportion of such expense; and in general the award should be framed accordingly. Parties, when submitting to a reference, should calculate upon such probable result, and if they would object, must stipulate accordingly, and expressly control the arbitrator's powers.

Must stipulate expressly that *submission* shall be made a rule of Court.

The principal point to *provide* for in agreements, bonds, and deeds of reference, is *against the power of revocation*, for which purpose the statute 9 & 10 W. 3, c. 15, s. 1, requires that there be *an agreement in writing* to refer the controversy, suit or quarrel, to the award or umpirage of some person or persons; and, *secondly*, that such agreement or condition of the bond do *also stipulate that the submission of* the parties *shall be made a rule of a Court of Record*. The 3 & 4 W. 4, c. 42, s. 39, we have seen, is to the like effect. If it be not *in writing*, the agreement is not within the act; (*a*) and an agreement not strictly of *reference*, but as regards any other matter, is not within the acts; (*b*) and unless there be an express stipulation *incorporated*

(*a*) ——— v. *Wills*, 17 Ves. 421. 7 Moore, 466, S. C.
(*b*) *Steers* v. *Harrops*, 1 Bing. 133;

for making the submission a rule of Court, the statutes would not apply, and the reference would be valid only at common law, and therefore revocable. But a consent that the *award* shall be made a rule of Court has been considered as equivalent to an agreement that the *submission* shall be so made.(*c*) And if such a stipulation has *originally* been introduced, then although advisable, yet it is not strictly necessary that it should be again introduced in an agreement to extend the time, it being presumed that the parties therein intended to enlarge the original power with all its incidents.(*d*)

Submission by an agent or trustees, how to be framed.

If the submission is to be by *an agent* or person acting on behalf of *another party*, care must be observed that the submission be framed accordingly, and so as to avoid personal liability on the part of the *agent*.(*e*) But where the reference is by an agent in the character of treasurer for a company under an act of Parliament, he will not in general incur personal liability to perform the award;(*f*) and it has been considered that persons referring as *trustees*, are not to be personally liable; but that must depend on the terms and object of the reference.(*g*)

Submission by executors, assignees, &c.

If *executors* should refer, we have seen that the submission should be so framed as to protect them from personal liability, unless they have assets.(*h*) So *assignees of a bankrupt*, when they refer a claim upon the estate, should take care to provide that the sum awarded, whether for debt or expenses, shall be only payable out of the assets, and not by them personally;(*k*) and if *several parties* have distinct interests or liabilities, then although they may concur in one reference, yet it should be expressly provided that each shall only be separately liable for his own default, and not also for other parties.(*l*)

Power of arbitrator limited.

If it be intended to *limit the powers of the arbitrator*, and prevent him from making a *general* award, and to require him to state any facts or point of law, care must be observed to introduce express words in the submission to that effect; and it should not state merely that the arbitrator shall be *at liberty*,

(*c*) 3 East, 603; 2 Bos. & P. 444; 1 Ld. Raym. 674; 1 Salk. 72; Beames, 55. *accord.*; 2 Stra. 1178, *contra.*

(*d*) 5 East, 189; 8 East, 13, *accord.*; and 8 T. R. 87, *contra.*

(*e*) *Bacon* v. *Dubarry*, 1 Lord Raym. 246; as thus: "That the said *A. B.* " as agent for *E. F.*, duly authorized, but " not in any respect to subject him the " said *A. B.* to any liability whatever, " agrees that all differences between the " said *E. F.* and *G. H.* shall be, and the " same are hereby referred and sub- " mitted to the arbitrament, &c."

(*f*) *Corpe* v. *Glynn*, 3 B. & Adolph. 801.

(*g*) 3 Esp. R. 101; Tidd. 9th ed. 836; but see 2 Chitty's Rep. 40; *ante*, 78, note (*c*.)

(*h*) *Ruddell* v. *Sutton*, 5 Bing. 200, *ante*, 77.

(*k*) *Ante*, 77, 78.

(*l*) *Munsell* v. *Burredge*, 7 Term. R 352; *Genner* v. *Tinker*, 3 Lev. 24.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

but peremptorily that he *shall* state what is required; (*k*) and if it were merely that he shall state any point of *law* that may be raised, it would suffice if his award merely state the abstract questions of law without reference to any particular state of facts, and to certify that he has overruled them, and the Court would refuse to direct him to set forth the facts; and therefore the submission should, in a case of this nature, peremptorily require a specific statement of the *facts.* (*l*) But "the words shall or may state," &c., have been considered imperative on the arbitrator to comply.

Other suggested terms.

The *other terms* of reference are entirely matter of particular agreement, but frequently require much precaution and consideration. In the subscribed note a few stipulations are stated so as to guard against inconveniences, which, it seems from different decisions, have occurred for want of proper terms having been inserted in the agreement or order of reference; and such of them as may be applicable to each particular case may readily be adopted, and the rest rejected. (*m*)

(*k*) *Ante*, 76, 78, and see Form in note, *post*, 90.

(*l*) *Jag* v. *Byles*, 3 Moore & Scott, 86, and *ante*, 76, 78; see forms of submission, *post*, 90.

Agreement of reference not under seal.

(*m*) "Memorandum of an agreement made this —— day of ——, A. D. ——, between *A. B.*, of ——, and *C. D.*, of ——, as follows; viz." &c. [state recitals and terms as below, or proceed at once to the statement of the agreement to refer, as below; but to bind *heirs*, and afford a preference in the administration of assets by an executor or administrator, a reference by deed or bond is preferable.]

The like by cross bonds.

If the submission be by cross bonds, the obligatory part is to be in the form of a common money bond; and then the condition should recite the differences, and the agreement to refer, as in the following indenture; and the *condition* should be, for abiding by the award to be made, in substance as in the indenture.

Indenture of reference.

Recital of general or particular grievances.

"This indenture, made the —— day of ——, A. D. ——, between *A. B.*, of ——, and *C. D.*, of ——. Whereas differences and disputes have arisen and are depending between the said *A. B.* and *C. D.*," [if these be special, and it is important expressly to limit the power to award upon one or more particular points, then it may be advisable here to specify them, and afterwards to limit the power expressly to the recited differences; but if the reference be general of all matters in difference, then no specification will be necessary, and the agreement or deed should immediately proceed thus]: "Now this indenture [*or* agreement] *witnesseth* that the said *A. B.* and *C. D.* do, and each and every of them doth, each for himself severally and respectively, and for his several and respective *heirs*, executors, administrators, and assigns respectively, covenant, promise and agree to and with each other, his heirs, executors, administrators and assigns, well and truly to stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament and final determination of *G. H.*, of ——, of and concerning the premises aforesaid, or any thing in anywise relating thereto; and also of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, at any time heretofore, up to and upon the day of the date hereof, had, made, moved, brought, commenced, sued, prosecuted, committed, or depending by, or between the said parties, or any of them, and in particular of and concerning a certain cause now depending between the said *A. B.* and *C. D.* in the Court of ——, and all other matters in difference between them, up to the day of the date hereof, inclusive hereof, so as the said

Stipulation to abide by award.

Power to enlarge.

If the reference be directed by a rule or order of the Court or a Judge, it may be amended by inserting such omitted matters

Amendments of submission.

award of the said *G. H.* be made under his *hand*, on or before the —— day of —— next, *or* such further time or times as the said *G. H.* shall from time to time appoint by indorsement written thereupon, and signed by him: And it is also agreed by and between the said parties, that these presents shall be made a rule of one of His Majesty's Courts of Law or Equity, at Westminster, to the end that the said parties respectively may be finally concluded by the said arbitration, and award thereon, pursuant to the statute in such case made and provided: Also that the said parties or either of them and their witnesses may be examined on oath before the said arbitrator: Also that all the costs and charges of the said action shall abide the event, but that the costs and charges attending the present arbitration and award to be thereupon made, shall be in the discretion of the said arbitrator. In witness whereof they have hereunto set their hands and seals respectively, the day and year above written.

Agreement that the submission *shall* be made a rule of Court. Parties and witnesses to be examined on oath. Costs of action to abide the event. All other costs in discretion of the arbitrator.

"Signed, sealed, and delivered, being first duly stamped, in the presence of us } *A. B.* (L. S.) *C. D.*" (L. S.)

"And that the award of the said arbitrators, or any two of them, whether expressed to be made by all or some, but signed only by two, shall be binding on the said parties." *Thomas* v. *Harrup*, 1 Sim. & Stu. 524.

Proviso that an award *signed* by two or three arbitrators to suffice.

"And that the said arbitrators or the major part o them shall, either before or after they have disagreed, or become unable to make their award in the premises, choose, nominate, and appoint, in writing under their hands, one or more other arbitrators or umpires or umpire, in the premises; and that provided such fresh arbitrator, umpires or umpire shall have attended the meetings or parts of meetings before the said arbitrators, as shall in the judgment of such fresh arbitrators, umpires, or umpire, be sufficient, with the assistance of the minutes of evidence taken by the said arbitrators, or any one of them, to enable such umpires or umpire to make a just and correct award; then it shall and may be lawful for them and him, to make their or his award or umpirage accordingly, after having had or without having had, any further meeting, and at any time within one month after the said arbitrators shall have declined proceeding further in the matter of the said reference, or within such further time as the said fresh arbitrators, umpires or umpire, shall in writing signed by them or him appoint." *Bates* v. *Cook*, 9 Bar. and Cres. 407.

Power to appoint fresh arbitrators or umpire, and power for the latter to award without a further meeting.

"On or before the —— day of ——, or on or before such further or ulterior day or days as he the arbitrator shall or may from time to time appoint, in writing signed by him, and indorsed on this agreement [*or* 'order,'] or upon any rule or order made thereupon before the time so limited shall have expired, whether or not any further rule or order shall have been made thereupon; or at any time before he shall have certified in writing, signed by him, that he declines proceeding any further upon the said reference, or at any time within one month next after notice in writing, signed byone of the parties, that he will not consent to any further delay in making the award, unless the Court or a Judge shall think fit to direct that the time shall be extended for a further time named in the rule or order for that purpose. Provided nevertheless, that the said arbitrator shall not enlarge the time for making his award in the premises beyond the —— day, without a Judge's order for that purpose having been obtained on or before that day." See necessity for or use of these stipulations, *Mason* v. *Wallis*, 10 B. & Cres. 107; and see *Halden* v. *Glasscod*, 5 B. & Ald. 390; *Leggatt* v. *Finlay*, 6 Bing. 255; 1 Young & J. 16. Too frequently the terms of submission very unnecessarily require the expense of a rule or successive rules, and from want of attention in obtaining the rule or order in time, the arbitrator's power is determined. The best course is to avoid the necessity for any rule.

Extensive power to enlarge.

"To whom the cause and all matters in difference between the said parties are referred, with liberty and power to the said arbitrator to regulate the future enjoyment, management, care, and cleansing of a certain stream or watercourse called ——, or by some other name, by the said parties or either of them; and also with liberty and power to the said arbitrator, in case he shall find that any matter complained of by either party, hath been or is illegally erected or placed, or continued, then he shall or may award when and in what manner, and by whom, and at whose expense, the same or any, and what part thereof, shall be abated or removed, or shall or may be permitted to continue either in part or

Power to regulate or fix the terms on which a nuisance may be continued.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

as were incident to the substance of the agreement of the parties; (*n*) but not to substitute A. for B. as an arbitrator. (*o*)

in the whole, and for what time, and on what terms." *Rhodes* v. *Haugh*, 2 B. and Cres. 345.

Order of reference of an indictment for nuisance.

" And if the said arbitrator shall determine that there has been a nuisance, and shall be of opinion that the prosecutors are entitled to costs; then the said defendant agrees to consent to a verdict of guilty, and to pay the costs of the said prosecutors, and also of the said reference and award; and that it shall also be in the discretion of the said arbitrator, to determine and direct that the said defendant shall pay the costs of the special jury, and if he shall so award, then the said defendant agrees to pay the same." See necessity, *R.* v. *Moate*, 3 B. and Adolp. 237.

Stipulation against revocation by death, marriage, bankruptcy, &c.

" And it hereby agreed that in case of the death or bankruptcy, or marriage, or any illness or malady of the said parties, or either of them, it shall be lawful for the said arbitrator, nevertheless, to proceed and make his award in the premises, and that the same shall be binding on the survivor or survivors, and also upon the heir, executor, or administrator, and representative of each party, and also on his assignee, trustee, or committee, so far as the same can or may be by law; but so far only as to affect any assets legally applicable to the satisfaction of any sum or costs awarded, and not to bind or affect any such heir or representative personally, or other person, or to subject either of the said parties to liability from which he would have otherwise been discharged." 3 B. & Cres. 144; 6 B. & Cres. 255. *In matter Joseph* v. *Webster*, 1 Russ. & M. 496; see also *post* 102, 3.

Stipulation that the death of the arbitrator shall not revoke, &c.

" And it is hereby agreed, that in case the said arbitrator shall die, or become unable, or shall decline to proceed in the said reference, the power to arbitrate on the premises shall not thereupon abate or determine, but that it shall be lawful for the Court of —— or one of the Judges thereof, or the Clerk of the Rules thereof for the time being, to nominate and appoint one or more arbitrators to award upon the premises, in lieu of the said hereby named arbitrator, and that the agreement and the award thereupon shall extend and apply in all respects as if such person had been the original arbitrator." See *post*, 103, n. (*k*)

Power to examine parties and witnesses on oath.

" With liberty to the said arbitrator to examine the said parties and their witnesses upon oath, or otherwise, as he shall think fit." *Warne* v. *Bryant*, 3 B. & Cres 590. See the necessity for this, 3 & 4 W. 4, c. 42, s. 41; *ante*, 83.

Stipulation to state a candid and explicit account of claims, and produce documents.

" And it is hereby agreed, that each of the said parties shall and will, at least two days before the first or any subsequent meeting appointed by the said arbitrator, produce and deliver to him a full, true, just, candid, and clear account or statement in writing, of all and every item of his claim, or set off, or advance, or payment or deduction, and shall and will thereby and therein admit such items on the other side as he knows to be correct, and endeavour to reduce the enquiry before the said arbitrator to as few items as may be possible; and that in default of either of the said parties so doing, then that the said arbitrator shall and may award such costs or sum of money, as stipulated damages in lieu of costs, to be paid by the party guilty of neglect in the premises, as he may think fit. And further, that each of the said parties shall and will, at each and every meeting before the said arbitrator, without any previous notice so to do, produce, and leave in the possession of the said arbitrator until he has made his award, all and every document whatever, that directly or indirectly relates to the matters in difference."

Stipulation that the arbitrator shall expressly, upon the face of his award, *adjudicate separately* upon each claim.

" And for the more explicitly, satisfactorily, and permanently adjusting and determining all and every matter of dispute or difference between the said parties that shall or may be brought before the said arbitrator, it is hereby agreed that the said arbitrator shall, at the request of the said parties, or either of them, when reasonably required so to do by writing signed by the party, and delivered to the said arbitrator at least twenty-four hours before he shall make his award, in and by his said award, state and separately adjudicate upon every claim made by or on the behalf of either party, and state whether he allows or disallows the same."

Stipulation that the arbitrator *shall* if required state the evidence and points of law on the face of his award.

" And it is hereby expressly declared and agreed that the said arbitrator shall, at the instance and request of either of the said parties, state in explicit terms, upon the face of his award, the exact *evidence and facts*, in respect whereof either of the said parties shall think fit to state or raise any legal objection or question, whether upon the admissibility or competency of any evidence or witness, or upon

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(*n*) 5 Taunt. 662; 4 Taunt. 254; but see 2 Chit. R. 29; 5 Moore, 167.

(*o*) *Rex* v. *Bingham*, 1 Cromp. & J. 245. As to a submission obtained by fraud, see *Sackett* v. *Owen*, 2 Chit. R. 39.

Although in order to make the submission a rule of Court, an affidavit of its execution may be made at any time after, and the making of such affidavit may be enforced,(p) yet it is in general most prudent to obtain the same *at or immediately after* the

Secondly, The affidavit of the execution of the agreement or deed of reference.

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any question of law touching or in any wise relating to the interests of either party, respecting which his the said arbitrator's award is to be, or might or ought to be made, together with the said arbitrator's opinion thereupon, and in so clear and distinct a manner as to enable both or either of the said parties to obtain the opinion of the Court of ——, touching such question or point of law, or the due effect to be given to such evidence, or to the opinion or decision of the said arbitrator, or the result and validity of his award in the whole or in part." See the necessity for this stipulation, *Jung* v. *Byles*, 3 Moore and Scott, 86; *ante* 87, 88.

Power to award costs of delay.

"And it is hereby further agreed, that if either party, by affected or unreasonable delay or otherwise, shall hinder, prevent or impede, or endeavour to hinder, prevent or impede the said arbitrator from or in making his award so soon as he ought, or otherwise might do, he or she shall pay such costs or sum of money as the said arbitrator or the said Court shall award or adjudge right and just." Watson, 24; *Aston* v. *George*, 2 B. & Ald. 395; 1 Chit. R. 204, S. C.

Power to proceed *ex parte*, in case of absence, or not bringing forward evidence.

"And it shall and may be lawful for the said arbitrator, at any appointed meeting or hearing by him had to proceed at and upon the appointed time, *ex parte*, to subject the party thereupon absent, or not adducing reasonable evidence sufficient to occupy the time of a meeting of two hours duration, to any reasonable expences, the amount of which he shall or may by his award fix and direct to be paid, or he may direct that the same shall and may be taxed by the proper officer of the Court, and to be paid by such party when so taxed." The 3 & 4 W. 4, c. 42, s. 39, expressly requires the arbitrator to proceed *ex parte* after revocation, and declares that the award shall be valid.

Power to proceed *ex parte*, in a fuller form.

"And it is further agreed, that if either of the said parties shall fail or neglect to attend before the said arbitrators or umpire, at any meeting appointed by them or him, after three days' previous notice shall have been given or sent to the said parties thereof, then the said arbitrators or umpire shall be at liberty to proceed from time to time *ex parte*, and to make their or his award; and that the party absent shall at most be entitled at any subsequent meeting to require the arbitrator to state to him the substance of the evidence adduced when he was absent, and in case he shall desire to cross-examine any witness who has given any evidence whilst he was absent, he shall, at his own expence, obtain the attendance of such witness; but the opponent shall nevertheless give him facilities in obtaining the presence of such witness, and the absent party shall, at all events, pay every expence and increase of charge occasioned by his absence."

Agreement to prevent an executor from being liable without assets.

"And it is hereby agreed that the said —— shall not be personally liable to pay any sum of money or costs, under or by virtue of the award to be made by the said arbitrator, further or beyond the assets he hath or shall or may have, as the executor of Mr. ——— and legally applicable to the satisfaction thereof; nor unless the said arbitrator shall, by his award, expressly find and decide that after paying all debts of a higher nature or degree, the said ——— hath assets in his hands sufficient to pay the sum, if any, found due by the said award, or some and what part thereof, together with the costs of the said action and of the reference and award, to be paid as the said arbitrator shall direct." See necessity for this qualification, *ante*; and *Ruddell* v. *Sutton*, 5 Bing. 200. *In matter Joseph and Webster*, 1 Russ. & M. 496. *In re Wansborough*, 2 Chit. R. 40.

Power to award the entry of a judgment to secure payment.

"And it is hereby agreed that the said arbitrator may award and direct such proceedings either as relate to pleading or practice, or the executing of a warrant of attorney to confess judgment, or signing a cognovit, to be had, and such *judgment* to be entered, as he shall think fit, to secure the payment of all sums and costs by him awarded to be paid, and that each of the said parties will adopt such measures as shall be necessary or proper in that behalf, so as to observe such direction as nearly as may be." See *Hutchinson* v. *Blackwell*, 8 Bing. 331; 1 M. & S. 513. A submission to refer a cause and *the issue* therein to a barrister, does not authorise him to award a verdict to be entered: and *semble*, that unless a jury has been empanelled and sworn, it would be improper to award a *feigned verdict* to be entered, and that the only course would be to award that judgment be entered by confession, and *relicta verificatione* of the plea, or *nolle prosequi* against a plaintiff.

(p) *Post*, 92, note.

instrument has been signed, and the subscribed form is proper for the purpose; (q) and there should be a duplicate affidavit annexed to each part of the instrument of reference, and sworn, so that each party may have one to use.

Thirdly, Of making the submission a rule of Court.

As the statute speaks only of Courts of *Record*, it has been considered that the Court of Chancery, which is not in strictness of record, is not within the act; (r) but the second section of the 9 & 10 W. 3, c. 15, imports that the Legislature intended to include the superior Courts of Equity; and in practice, Courts of Equity have long assumed concurrent jurisdiction. (s) And in equity as well as at law, a submission to reference may be made a rule of Court as well after the award has been made as before. (t) It may also be made a rule of Court in vacation as well as in term. (u) But when the reference is by agreement or deed, it is advisable to make it a rule shortly after the agreement has been entered into; because as an affidavit of the due execution of the agreement is required in order to make the same a rule of Court, death or absence, or refusal of the witness to make the requisite affidavit, might occasion at least delay, if not difficulty (v) Besides, when the parties and witnesses know that they are to act and give evidence under a rule already obtained,

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Stipulated damages to be paid in case of unreasonable [illegible]

"And in case either of the said —, [illegible] said arbitrator [illegible] making his [illegible] in proceedings or otherwise [illegible] following, that is to say; if the said defendant shall occa[illegible] or [illegible] such hindrance or prevention, then he shall pay to the said plaintiff the sum of *l.* — as being the estimated and stipulated and hereby agreed amount of the sum claimed by the said plaintiff, together with the costs which the said plaintiff has and probably will incur; and if the said plaintiff shall occasion such hindrance or prevention, then he shall pay to the said defendant the sum of *l.* —, being the estimated, stipulated, and hereby agreed amount of the expences and costs which the said defendant hath and probably will incur in his defence of the premises. And that it shall and may be lawful for the said arbitrator to award within any reasonable time hereafter, that the said sum shall be paid accordingly; and also to award and direct what, if any, judgment shall be caused to be signed or entered, to secure the due payment thereof.

Form of affidavit of signature to the agreement of reference by attesting witness.

(q) In the Court of —.
A. B., of, &c. clerk of *G. H.*, of —, attorney, maketh oath and saith, that he was present at the time of the signing the agreement hereunto annexed [*or* of the signing, sealing and delivery of the bond "or deed" hereunto annexed]; and that *C. D.*, of —, and *E. F.*, of —, therein mentioned, did duly sign [*or* seal, and as his and their act and deed deliver] the said agreement [*or* bond or deed] in the presence of this deponent; and that the names of *C. D.* and *E. F.*, set and subscribed to the said agreement [*or* bond or deed] are respectively the proper hand-writing of the said *C. D.* and *E. F.*, and that the name of *A. B.*, set and subscribed as the witness thereto, is of the proper hand-writing of this deponent.
[Sworn, &c.] *A. B.*

(r) Tidd. 9th ed. 821; but citing 2 Mad. Ch. Pr. 713.

(s) 2 Mad. Ch. R. 713, 4. *Post.*

(t) *Cheede* v. *Lequesne*, 2 Ves. 315; *Pownal* v. *King*, 6 Ves. 10; *Symes* v. *Smith*, 5 Mad. Rep. 74, overruling *Spellinge* v. *Carpenter*, 3 P. Wms. 361.

(u) 5 B. & Ald. 217; Tidd. 836.

(v) 1 Stra. 1; 10 Mod. 322, S. C.; Barnes, 58; 1 Price, 308; 1 Chit. R. 743.

and which might be promptly acted upon by attachment, they may be the more disposed to act correctly. Where four actions, three in the Exchequer and one in the King's Bench, were referred by an agreement of reference, which had been made a rule of the King's Bench under a clause therein, empowering the parties to make it a rule of the King's Bench or Exchequer, the Court refused to allow the agreement to be made a rule of that Court; and that Court appears to have considered that the statute 9 & 10 W. c. 15, only authorizes the making an agreement to refer a rule of *one* Court, and not of more than one. (*w*)

Fourthly, Appointment of umpire.

If the arbitrators have power to appoint another arbitrator, or an umpire, in case they should *disagree*, they may immediately, and before any disagreement, appoint their umpire; (*x*) and it seems better to make the appointment before disagreement, as they are more likely to concur in a judicious choice before than after disagreement, and after which they might not be able to concur, and by which any award might be prevented. It has been further held, that in such a case the circumstance of the arbitrator, or even of a stranger, joining with the umpire in making the award, did not prejudice. (*y*) The refusal of one umpire to accept the appointment, does not preclude the arbitrator from appointing another within the time limited; (*z*) and although an umpire cannot in general make his award until after the original arbitrators have refused to proceed, yet he may do so at any time after they have declared that they will not make an award. (*a*)

In general, the appointment of another arbitrator, or of an umpire, must be the result of the exercise of sound discretion, and not of chance, as tossing up or drawing lots; (*b*) and this although the original arbitrators had each chosen and named a proper person as an umpire, and then tossed up whose nominee should be appointed; for both ought *mentally* to have concurred in the selection. (*c*) The form of appointing an umpire may depend on the terms of their power, but may in general be as subscribed. (*d*)

(*w*) *Wimpenny* v. *Bates*, 2 Cromp. & Jervis, 379; and *post*, as to Courts of Equity.

(*x*) *Bates* v. *Cooke*, 9 B. & Cres. 407.

(*y*) And see 4 Taunt. 232.

(*z*) 11 East, 369, note (*a*).

(*a*) 3 M. & S. 559.

(*b*) *Ford* v. *Jones*, 3 B. & Adolph. 248; *Young* v. *Miller*, 3 B. & Cres. 407; *In re Cassell*, 4 Man. & Ryl. 555; 16 East, 51.

(*c*) Id. ibid; *Young* v *Miller*, 3 B. and Cres. 407.

Form of arbitrator's appointment of an umpire.

(*d*) Between *A. B.* and *C. D.*

We *G. H.* and *I. K*, the within-named arbitrators, do by virtue and in pursuance of the powers within contained and in us vested, hereby nominate

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

Fifthly, The meetings, and securing the attendance of witnesses.

Necessity or expediency of written appointments of meetings.

The principal difficulty incident to references to a barrister, especially when they are to be attended by counsel for each party, is the securing the *punctual* attendance of all requisite parties during a meeting of *useful duration*, so as really to dispatch with effect some considerable portion of the case.

It was always advisable, and since the enactment in 3 & 4 W. 4, c. 42, s. 40, would be necessary, in order to bring a party or witness into contempt for his non-attendance before an arbitrator, to serve upon him, together with a rule or order therein mentioned, "an appointment of the time and place of attend-" ance, in obedience to such rule or order, signed by one at least " of the arbitrators, or by the umpire before whom the attend-" ance and production of documents is required." Upon the acceptance of the reference, the arbitrator should be required to *appoint* the first and sometimes even subsequent meetings; and as adverse witnesses cannot be required to attend at more than *two consecutive days*, the appointment and order for their attendance should be framed accordingly. (*e*) The form of the appointment of the first or subsequent meeting may be to the subscribed effect, fixing the precise time, to prevent any supposition that it is only nominal, as occurs in some descriptions of meetings; and all duplicates of the appointments should be signed by the arbitrators and delivered to the respective attornies. If the appointment should be *after* and *pursuant* to a Judge's order or rule requiring the attendance of a witness, then it should refer to the order and the statute.

Hearing, and production of evidence at the *first* meeting.

If it be expected that there will be more than one meeting, then it may be advisable, unless death or absence is to be apprehended, not to produce adverse or expensive witnesses at the *first* meeting, but principally documentary evidence, and witnesses who may be in attendance, and whose testimony and

and appoint Mr. L. M., of ——, the third person or arbitrator [*or* "umpire"] within mentioned, he having been selected and chosen by us for that purpose, to act and award and decide as within directed. Witness our hands this —— day of ——, A. D. ——

G. H.
I. K.

(*e*) Sect. 40 of 3 & 4 W. 4, c. 42.

Arbitrator's appointment of the first or other meeting.

Between { A. B. & C. D. }

I appoint Monday, the —— day of —— instant, at seven o'clock in the evening precisely, at my Chambers, No. ——, Paper Buildings, Temple, for proceeding on this reference. Dated this —— day of —— A. D. ——

G. H., Arbitrator.

To Mr. A. B. and C. D., and their respective Attornies.

And also a form of a peremptory and final meeting, and of the intention to proceed *ex parte*.

Between { A. B. & C. D. }

I appoint ——, the —— day of —— instant, at —— o'clock in the evening *precisely*, at ——, *peremptorily* to proceed upon and conclude this reference; and I hereby give notice that in case of the non-attendance of either party, I shall nevertheless proceed and immediately make my award according to the statute in that case made and provided. Dated this —— day of —— A. D. ——

G. H., Arbitrator.

cross-examination will be short and rapidly disposed of. Because at such first meeting admissions may be made and other arrangements entered into so as to dispense with the attendance of adverse or expensive witnesses. The attornies for each party should examine and arrange their evidence and witnesses before the first meeting, in the manner hereafter directed to be observed in preparing for trial, and should evince before the arbitrator as much candour as justice may admit, and never make technical objections unconnected with the equity of the case, unless where by the terms of the reference, it will be imperative on the arbitrator to give them effect. (*f*)

Meetings to be absolutely effectual.

For the sake of the parties, and to avoid the increase of expense, when once a meeting has been fixed, it is the duty of the arbitrator to proceed, unless serious illness should prevent, and the attornies on both sides should so arrange that an adequate number, and yet not too many witnesses or evidence should be at hand, so as to prevent any meeting from being abortive; and in case the counsel for the parties should be unable to attend at the appointed time, the attorney himself should be fully prepared to proceed at least with documentary evidence, if not with the examination of witnesses. There is a strong moral duty in this respect to avoid the increase of fees and other avoidable expense, which constitutes one serious ground of objection to references. The 3 & 4 W. 4, c. 42, s. 40, contains ample powers to enforce the attendance of witnesses, and care should be observed to take all proper measures, and in due time, to secure their attendance at such meeting, and in the manner directed by the statute, viz. by obtaining a proper *rule or order* of a Judge, commanding the attendance of a party and the production of *documents which must be described* in the rule or order, and by further obtaining a *written appointment* of the time and place of attendance, signed at least by one of the arbitrators, if several, or the umpire, and that each of them be served in reasonable time before the meeting. There must also be a due *tender* of expenses, and the witnesses cannot be required to attend more than two consecutive days, to be named in the Judge's order.

Notices of the appointed meetings.

To avoid all pretence of mistake, it will be advisable for the attorney of the party whose interest it is to press forward in the reference, besides the notice usually given by the arbitrator of his appointment of the next meeting, made in the presence of the parties, to obtain from the arbitrator his written and signed appointment for each *successive meeting*, and to serve a copy

(*f*) See *ante*, 76, 78, 87, 88.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

upon the *opponent's attorney* in due time, at least two or three days before the named day, and refresh the opponent's memory on the day before, as to the precise hour of attendance; and a formal notice should at all events be served of any meeting intended to *be final*. This will avoid all pretence of misapprehension, which sometimes is available for the purpose of delay; (*g*) and further, it would be advisable, early on the day before the appointed time, to leave a copy of the appointment at the chambers of the respective counsel retained to attend upon the reference. If the arbitrator proceed without proper notice, his award might be set aside. (*h*)

Sixthly, Enlargement of the time.

In general, by the terms of the reference, the arbitrator has particular and express power to *enlarge the time* for making his award; and a power to enlarge without express limitation, enables the arbitrator to enlarge several times, and from time to time. (*i*) To prevent accident and forgetfulness as to the time or mode of enlargement, this should be as general and comprehensive as possible; for if it be precise and limited, it must be specially pursued; and therefore when, by a judge's order, a cause was referred to an arbitrator, so as he should make his award in writing on or before the 1st day of July then next, or on or before such further or ulterior day as he should appoint in writing under his hand, *to be indorsed on that order, and the Court of King's Bench, or a Judge thereof should order;* and the arbitrator, by indorsement on the order, enlarged the time; but at the time when he made his award, no Judge's order had been obtained ratifying that enlargement: it was held that the arbitrator *had no authority*, and that the award was void. (*j*) But it might be otherwise, if the parties to the reference proceeded therein without a due enlargement after the limited time without objection. (*k*) So where a time was limited for making the award by a bond of reference, and before that time had expired the parties, by another deed, enlarged the time, and the award was made within such extended time; it was held, that an action for the non-observance thereof might be sustained upon the bond. (*l*) But the exercise of this power is in general *discretionary*, and the refusal of an arbitrator to allow sufficient time, although it might be ground for a motion to set aside his award, could not

(*g*) *Dodington* v. *Hudson*, 1 Bing. 384.
(*h*) Salk. 71; *Anonymous*, 2 Chitty's R. 44.
(*i*) 1 Taunt. 509; 4 Taunt. 658; 2 Chit. R. 45.
(*j*) *Mason* v. *Wallis*, 10 Bar. & Cres. 107; but see 1 M. & S. 1, *contra*.
(*k*) *Leggett* v. *Finlay*, 6 Bing. 255; Young & J. 16.
(*l*) *Greig* v. *Talbot*, 2 Bar. & C. 179.

be pleaded in answer to an action for the breach. (m) Where a verdict has been taken for a named sum, subject to an award to be made by a certain day, merely as to the amount of damages, and the arbitrator accidentally let the day pass without making his award, and the defendant's attorney would not consent to the time being enlarged, the Court granted liberty to the plaintiff to enter up judgment and issue execution forthwith, for the whole amount of the verdict, unless the enlargement were consented to; though at the instance of the Bail they ordered that no execution should issue against them before a certain time, when it appeared that the defendant, who was abroad, would probably be in England. (n) But where a verdict had been taken at the Spring Assizes, subject to a reference, and the award to be made before the 16th of April, and the plaintiff's attorney neglected to obtain the Nisi Prius order until after the time had expired, the Court refused to let the plaintiff proceed on the verdict, although the defendant declined to submit to a new order of reference on the former terms, and left the plaintiff to proceed again to trial. (o)

As a measure of precaution, it is recommended that the arbitrator, when he has power to enlarge, do exercise it *at once for so long a time as to secure abundance of time to hear and determine upon the case*, and that in the most comprehensive terms, so as to avoid the possibility of the determination of his authority by effluxion of time, and which could not preclude him from making his award at an earlier day; the subscribed form would suffice. (p)

Seventhly, The proceedings before the arbitrator. (q)

Although the arbitrator, especially when he is a barrister, is invested with the functions of a Common Law and Equity Judge and of a Jury, and may make his award according to equity and conscience, without regard to the strict rules of law, either as respects evidence or the rights of the parties, yet in most cases, it is considered most expedient to observe the ordinary rules of evidence and law; and therefore the proceed-

(m) *Grazebrook* v. *Davis*, 5 B. & Cres. 534. As to setting aside award on ground of refusal to enlarge, see *Post*.

(n) *Taylor* v. *Gregory*, 2 B. & Adol. 774; and see *Wallis* v. *Kelly*, 1 B. & Cres. 68. In general, however, the plaintiff must proceed again to trial, unless an absolute verdict in his favour has been taken. *Hall* v. *Phillip*, 9 Bing. 89.

(o) *Doe* v. *Saunders*, 3 B. & Adolp. 783.

(p) Between { *A. B.* & *C. D.*

Form of arbitrator's enlarging the time for making his award.

I, *G. H.*, the arbitrator between the said parties, do, in pursuance of the power given me by the terms of submission, enlarge and extend the time for making my award herein until the —— day of ——, A. D. ——, and until I have made a perfect award upon the matters referred. Dated this —— day of ——, A. D. ——

G. H.

(q) As to *irregularities* in the arbitrator's proceedings, see *post*, as to setting aside an award.

ings before him should in general be conducted precisely as in a court of law, viz., by first hearing the statement of the counsel for the party who has to establish the affirmative, with his evidence delivered *vivâ voce*, avoiding leading questions, precisely as in Court, and then the statement of the counsel for the opponent with his evidence, conducted in like manner; and then, in cases of importance, the counsel on each side should make their observations on the whole case, on behalf of their respective clients. Sometimes, the arbitrator having previously received the statements in writing of each party, considers it unnecessary to hear any statements of counsel, and to save time, recommends the waiver even of observations; but in general, unless each party and his counsel is in full possession of the particular claims of his opponent, it may be essential that the statement should be made *vivâ voce*, so as to prepare the opponent to cross-examine the evidence of his adversary. Besides, the arbitrator may with propriety require a reciprocal statement, and a declaration of what particular items are admitted or disputed, with an intimation, that if there be any useless dispute upon items afterwards clearly established, he shall feel it his duty to award that the party occasioning the waste of time and expense, in adducing such evidence, shall pay all consequent expences.

Eighthly, Of enforcing the attendance of a witness, and the production of documents, in pursuance of 3 & 4 W. 4, c. 42. s. 40, and of swearing witnesses before an arbitrator.

Before the recent act, there was no mode or power of compelling the attendance of a witness before an arbitrator, even where he had engaged to attend; (*r*) and it was at least doubtful whether a witness could be indicted for perjury in respect of any false swearing before the arbitrator; consequently, arbitrators frequently could not proceed with effect. (*s*) But now any material witness may, on proper application to a Judge or the Court, be commanded by order or rule to attend and be examined before the arbitrator, upon his being served with the same, and a duplicate of the arbitrator's appointment signed by him, and upon being duly tendered a sum sufficient to cover his probable reasonable expenses, *eundo morando et redeundo;* and he may be also ordered to produce any *document* in evidence which a witness could not in general withhold from a Court and Jury; and if he be guilty of false swearing, he may be indicted for perjury. (*t*) The form of the affidavit to obtain an order or rule, and of a Judge's order thereon, are suggested in

(*r*) *Wansall* v. *Southwood*, 4 Man. & Ry. 359; and MS. 16th May, 1829.

(*s*) 3 Car. & Payne Rep. 419.

(*t*) See the terms of the enactment, *ante*, 82, 83.

the note, and may, perhaps, assist in any proceedings. (x) It will be observed, that the subscribed form of affidavit supposes

(x) In the Court of ——, [N. B. The title will depend on whether or not there is a cause in Court; if not, there should not be any title excepting as regards the Court. But when there is, then the title would properly be in the cause.]

Affidavit to obtain a Judge's order or rule, for a witness to attend before an arbitrator and produce certain documents, pursuant to 3 & 4 W. 4, c. 42. s. 40.

A. B., of ——, maketh oath and saith, that by an agreement in writing, made between him and *C. D.*, and signed by them respectively, they agreed to submit certain differences between them to the award of *E. F.* of —— , Esquire, Barrister at Law, such award to be made on or before, &c. next, or such further day as he should appoint; and that in pursuance of a written agreement, contained in the said agreement, to that effect, the said submission hath been made a rule of this Honorable Court, in pursuance of the statute in that case made and provided; and that the said *E. F.* hath accepted, and is proceeding upon the said reference, and hath, according to the said power, contained in the said agreement of reference, duly enlarged the time for making his award thereupon, until the —— day of —— next, and that the said arbitrator hath duly made and signed an appointment for a meeting upon the said reference before him, at his chambers, situate at, &c. on the —— day of —— next, at the hour of —— precisely, and on the next day, at the same hour, a copy of which appointment, signed by the said *E. F.*, is hereunto annexed, and is signed by the said arbitrator: And this deponent further saith, that *L. M.*, of ——, in the county of ——, gentleman, is now residing at —— aforesaid, in the county of —— aforesaid [or if he cannot be found, or keeps out of the way, instead of the above, say, "until the —— day of —— last, did reside in "the county of ——, but that he hath left his said residence, and although diligent "search and enquiry hath been made to ascertain where the said *L. M.* now re-"sides, his present residence cannot be ascertained, nor doth this deponent know, "nor can he ascertain where the said *L. M.* is now to be found; but he hopes and "expects that if an order shall be obtained, commanding the attendance of the said "*L. M.* before the said arbitrator, he this deponent will be able to serve the said "*L. M.* with the same, according to the statute, before the time for making an "award in the premises shall have expired;"] and this deponent is informed, and verily believes, that the said *L. M.* hath in his possession, custody or power, an indenture, &c. [here describe the document required, as fully as the nature of the case will admit]; and this deponent further saith, that he is informed and advised, and verily believes, that the said *L. M.* hath been, and is, and will continue to be a material and necessary witness for him the said *A. B.*, touching the matters so referred to the award of the said *E. F.* as aforesaid, and that it is and will be material and necessary that the said *L. M.* should attend and be examined, and give his evidence before the said arbitrator relating to the matters so referred, and should produce in evidence the said document, to and before the said arbitrator, on &c. next, or on the day then next following, or on some other days to be fixed by an order or rule in pursuance of the said statute, and that he the said *L. M.* hath not any just reason for refusing to attend and be examined, or for refusing to produce and have the said document read in evidence as aforesaid, and that he the said *A. B.* cannot safely proceed in the said arbitration without the evidence of the said *L. M.*, and the production and reading of the said document by and before the said arbitrator. And this deponent further saith, that he did on &c. last past, apply to and request the said *L. M.* to attend and be examined as a witness before the said arbitrator, and to produce the said indenture in evidence at the same time, and at the same time caused to be tendered and produced to him the said *L. M.* the sum of —*l.*, which was and is sufficient to cover and defray all the reasonable expenses incident to his compliance with such request, and also a reasonable and proper compensation for loss of time, but the said *L. M.* wholly refused to comply with such request, and declared he could not take any trouble in the premises. [The latter, respecting the applicant's tender and refusal, must necessarily depend on the facts.]

Sworn, &c.

Between { *A. B.* and *C. D.* }

Judge's order thereupon, for the attendance of the witness with a named document.

Upon reading the affidavit of *A. B.*, and the paper writing and appointment thereunto annexed, I do order and command *L. M.*, now residing at ——, in the county of ——, and in the said affidavit mentioned, to attend before *E. F.*, Esquire, the arbitrator in the said affidavit and paper writing mentioned, on two consecutive days, that is to say, on Monday, the —— day of —— next, at seven

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

that the submission has already been made a rule of Court, and which is recommended; but this is not absolutely necessary; and it should seem, that even the appointment of a meeting before the arbitrator, need not precede the order or rule requiring the attendance of the witness; but it is suggested, that it may be most convenient, at the first or subsequent meeting before the arbitrator, to state who are known to be reluctant witnesses, from previous application to them, and to request him to make an appointment of two meetings on consecutive days, allowing reasonable time for afterwards obtaining the order or rule, and serving the witnesses with the same, and together with a separate appointment of the two meetings, signed by the arbitrator, and in time to enable them, without hurry, to prepare for and take the necessary journey. And as an additional precaution *after* the order or rule has been obtained, another appointment, reciting and corresponding with the order or rule, might be made by the arbitrator, and served upon the witness.

Ninthly, Of the arbitrator's swearing the witnesses.

In cases of references at *Nisi Prius*, it is usual to swear all the witnesses then assembled to give evidence before the arbitrator. But if this has been omitted as to one or more witnesses antecedent to the meeting before the arbitrator, the witnesses may be sworn before a Judge, and the *jurats* produced to the arbitrator. But since the recent act, much expense may be saved and facility given under the 41st section, (*u*) which enacts, that when in any rule or order of reference, or *in any submission* to arbitration, containing an agreement that the submission shall be made a rule of Court, it shall be ordered or *agreed* that the witnesses upon such reference shall be *examined upon oath*, then the arbitrator may administer an *oath* to each witness, or take his affirmation; and, in case of false swearing, the crime of *perjury* shall be deemed to have been committed. In these

o'clock in the evening of that day precisely, and also on Tuesday, the next day, at the same hour, at the chambers of the said *E. F.*, situate at ——, being the days, times, and place in the said appointment mentioned; and that the said *L. M.* do then and there submit to be duly sworn and examined upon his oath by and before the said arbitrator, as a witness in the matter of the said reference; and do also then and there duly make answer unto such lawful questions as shall then and there be put to him as such witness by or before the said arbitrator; and I do further order and command the said *L. M.*, at the time and place aforesaid, to produce and give in evidence to and before the said arbitrator a certain document, being, &c. [describe it fully] in pursuance of the statute in that case made and provided; and that the said *L. M.* fail not in the premises, upon pain of his being deemed to have been guilty of a contempt of the said Court. Dated this —— day of ——, A. D 1834.

[Signature of the Judge.]

(*u*) 3 & 4 W. 4, c. 42. *Ante*, 83.

cases, the proper oath or affirmation is to be administered to the witness verbally, as at *Nisi Prius*, and nearly in the same form, excepting that the arbitrator, instead of the officer of the Court, is to require the witness to take into his hand the proper book, (*i. e.* the *New* Testament, if a Protestant or Quaker, and the *Old* Testament, if a Jew;) and then the arbitrator is to state to the witness the form in the note; and the witness, after signifying his assent, is to kiss the book, which completes the swearing. (*v*)

Tenthly, Examination of witnesses, and evidence of the parties.

It is very generally provided in orders of reference, that the arbitrator shall be *at liberty* to examine the parties themselves; an advantage for a party, which in some cases he would do well to *insist upon*, by absolutely requiring such examination. There are many cases in which one of the parties may be able justly to prove a sale or loan or a payment, when he has no other evidence of the fact, and his interest ought to affect rather his credibility than his competency. It having, however, been found, that in general the interest of parties has so strongly influenced their minds, and warped their memory, in favor of a fact that really had no existence, especially when connected with conversation, so frequently misunderstood, that they will venture to swear to it, and this really without intending to commit perjury, therefore arbitrators are in general reluctant to exercise *the liberty*, because they anticipate that probably the other party will equally strongly and sincerely deny the other's statement; so that, in reality, little or no light is thrown upon the point. This, however, is entirely matter of discretion. There is certainly no foundation for the common supposition, that under such a power, a party has no right to require the arbitrator to examine him, to give evidence *in his own favor*, but only to expose him to cross-examination; certainly, no such rule prevails in law or justice; and, accordingly, it has been expressly held, that where by an order of *Nisi Prius* a cause was referred to an arbitrator, with liberty to him, *if he should think fit*, to examine the parties to the suit; he, the arbitrator, might examine a party to the suit in support of his own case. (*w*) And the Court refused to set aside an award, on the ground that the parties had been examined by consent, and that, subsequently

Form of oath or affirmation to be administered by an arbitrator to a witness, pursuant to 3 & 4 W. 4, c. 42. s. 41.

(*v*) "You shall true answer make to all such questions as shall be asked of you by or before me touching or relating to the matters in difference referred to my award [*or* to the award of myself and *G. H.*] without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth."

So help you God.

(*w*) *Warne* v. *Bryant*, 3 Bar. & C. 590. See form, *ante*, 90.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

to the award, the plaintiff had discovered that the defendant was a felon convict. It appeared, however, in that case, that the judgment of the arbitrator was formed independently of the defendant's testimony. (*x*)

Eleventhly, Mode of taking the evidence.

As, under the recent act, witnesses will certainly be indictable if guilty of perjury, the evidence, whether in examination or cross-examination, when any case of perjury is apprehended, should be carefully taken down in writing in the form of questions and answers; and, when concluded, the witness should read over the same, and be asked by the arbitrator whether he would wish to add any thing; and the further questions and answers should be also written down; and then the witness may as well sign the statement. And the attorney for each party should take and keep a duplicate, or the original should be retained by the arbitrator.

Twelfthly, Of Revocations in fact or law.

The recent act, 3 & 4 W. 4. c. 42. s. 39, we have seen, prevents the effect of any Revocation by *act of the parties,* in all cases where the agreement of reference was in writing, and stipulated that the submission should be made a rule of a Court of Record; for it *requires* the arbitrator to proceed *ex parte* in case of any such revocation, and declares that the award shall be valid notwithstanding it. (*y*) In cases not within the act, although an award after notice of revocation would be invalid, yet if there has been a mutual agreement, bond, or covenant to submit to arbitration, and abide by an award to be thereupon made, it is clear that upon proof that there was a debt or damages to a certain or ascertainable amount justly recoverable, and which probably would have been awarded, the same sum would probably be recovered from the party revoking and his surety, in an action upon the contract of submission, assigning the revocation as a breach thereof; and probably upon stating the payment of costs and expenses occasioned by the revocation as special damages, those also would be recovered. (*z*)

It will be observed, however, that the recent statute does not absolutely prohibit a revocation, but only requires the leave or sanction of the Court or Judge to such a proceeding. And as

(*x*) *Smith* v. *Sainsbury,* 9 Bing. 31.

(*y*) *Ante,* 82. Before that act, in *Skee* v. *Coxon,* 10 B. & Cres. 483, it was held, that a revocation of a submission, even by order of *nisi prius,* rendered a subsequent award invalid, and that the only course was to proceed to punish the party for his contempt; and see *Clapham* v. *Higham,* 1 Bing. 87; 7 Moore, 403, S. C.

(*z*) *Ante,* 80; *Warburton* v. *Storr,* 4 B. & Cres. 103; and per Parke, J. in *Skee* v. *Coxon,* 10 B. & Cres. 483.

before, so still since the act, there may be cases where perhaps even without previous leave a revocation might be given effect to, although in all respects the submission were perfect under the act; as if the arbitrator should act partially, or otherwise improperly. (*a*) Strictly, in such a case the proper course would be, upon affidavit of the facts, to move or obtain a summons for leave to revoke, with in the mean time a stay of the proceedings upon the reference; but perhaps the sudden expectation of a precipitate and unjust award would justify an immediate revocation to prevent it, and which proceeding would probably afterwards be sanctioned by the Court. (*b*)

By marriage.

It is probable that the *Marriage* of a woman pending a reference, although a legal revocation, would be considered a revocation by her own act within the meaning of the statute, and that an arbitrator might in such a case proceed. (*c*)

By death.

The Death or Bankruptcy of a party is not provided for by this or any other act, and consequently the previous decisions in those cases will still apply. The *Death* of either of the parties is in law an *implied revocation* of the power to proceed, unless it be expressly or *impliedly provided otherwise*. (*d*) If by the terms of reference the award is to be delivered to the parties, *or their executors or their personal representatives*, that is considered evidence of an intended authority to proceed, notwithstanding death. (*e*) If, therefore, the evidence of either of the parties would be important, it should be provided that unless his evidence has been previously given, the authority to award shall be determined by his death; and it would be advisable to take his evidence in the first instance, so as to avoid any supposition that any evidence has been excluded.

The law upon the subject of revocation by death has been recently fully examined in the Privy Council; and it was held, that an award is invalid if one of the parties to the reference should die before it were made, unless the *heir* or representative of the party has been expressly named in the submission. (*f*)

(*a*) *Green* v. *Pole*, 6 Bing. 443; *Steward* v. *Williamson*, 5 Bing. 415; 2 B. & Ald. 395; 1 Chit. R. 204, S. C.; and see Tidd, 9th ed. 835.

(*b*) Id. ibid.

(*c*) 5 East, 266; Tidd, 9th ed. 822, 3, 835.

(*d*) *Rhodes* v. *Haigh and another*, 2 B. & Cres. 345; *Tyler* v. *Jones*, 3 B. & Cres. 144; *Clark* v. *Crofts*, 4 Bing. 143; *President* v. *Van Reenen*, Knapp's Rep. 33, 100, 102; *post* 103, note (*f*). See express proviso, *ante* 89, in note.

(*e*) *Jones* v. *Tyler*, 3 B. & Cres. 144; *Clark* v. *Crofts*, 4 Bing. 143; *M'Dougal* v. *Robertson*, id. 435; 6 B. & Cres. 255; 7 Taunt. 571; 1 Marsh. 566; 2 B. & Ald. 394.

(*f*) *The President and Members of Orphan Board* v. *Reneen*, Knapp's Rep. 83—100, 101, A. D. 1829. In giving judgment, the Court said: If men who submit to arbitration, in the instrument of submission bind *their representatives*, in a case where the action would survive to or against their representatives, al-

But where a submission to arbitration contained an express stipulation that it should not be vacated by the death of either of the parties, and that notwithstanding such an event matters should be proceeded in, and the final award was made after the death of one of the parties, it was held that even *a surety* for the fulfilment of it was liable. (g) Probably if an executor should *adopt* an arbitration, although the personal representatives were not named in the submission, he would be bound, (h) and might even be personally liable to costs. (i) The death also of the arbitrator will determine all power to proceed, unless the submission should provide otherwise. (k)

Bankruptcy, its effects.

The *Bankruptcy* of either party is not necessarily a revocation of the arbitrator's authority to proceed and make his award, at least so as to bind the bankrupt and his opponent. (l) But in case the assignees should, before the award has been made, give notice of their dissent to any further proceeding in the refer-

though one or both of the parties should die before the award be made, the arbitrators may proceed with the reference. They have provided for the event of death, and agreed that those who take their property, should take it subject to the decision of the arbitrators appointed; but if the representatives are *not included* in the reference, and one of the parties die, that reference is determined. It has been argued that the ancestor and heir are identified, and that what binds one binds the other. If the ancestor bind the property, the heir must in general take it, subject to the obligation which the ancestor has imposed on it. But this rule does not apply to arbitrations. *A man who agrees to a reference may know that he is capable of giving explanations which his heir cannot give.* He knows that if his opponent be examined as a witness, he may be examined also. For these reasons he may agree to bind *himself* to submit to an arbitration; but not to bind those who are to succeed him. That this principle is founded in wisdom, is proved from its having been adopted into the laws of England, Scotland, (Erskine's Institutes, book 4, tit. 3, s. 33,) Spain, (Johnson's Translation of the Principles of the Spanish Law, p. 295), and into the civil law (Dig. lib. 4, tit. 8. l. 27; Domat. lib. 1, tit. 14, s. 1, pl. 6). We have been referred to no Dutch authority to show us that the law of Holland differs from the civil law, or that of other states which have adopted the civil law. The passage cited from Vanderlinden applies to actions in Court, not to arbitrations. It seems that according to the law of France, (Code de Procedure Civile, liv. 3, tit. Unique, s. 1013), an arbitration is not stopped by the death of one of the parties, if his heir be of full age; (see also as to the French law on Arbitrations, the Code de Commerce, liv. 1, tit, 3, s. 2. Des Contestations entre associée;) but I think a French jurist must have thought the reference could not have been continued in this case, where the heir was a married woman, the right of the husband to represent her was disputed, and the dispute in this point was kept up for nearly three years, during which time the arbitrators proceeded, attended only by one party. According to the civil law, if the heir of one party be named, and the heir of the other be not named, and either party dies, the reference is at an end. We therefore think, that the judgment of the Court of Appeal, which is founded on the evidence of a void award, and the judgment of the Court of Justice, which, after the submission of the parties to arbitration, treated the settlement between them as conclusive, must be set aside, and the cause sent back for the further examination of all the accounts.

(g) *M'Dougal* v. *Robertson*, 4 Bing. 435; id. 143; 3 Bing. 20; 3 B. & Cres. 144.

(h) *Semble*, with analogy to the cases of the assignees of a bankrupt; *Dod* v. *Herring*, 1 Russ. & M. 153; 3 Simon's Rep. 143, S. C.

(i) *Joseph* and *Webster*, 1 Russ. & M. 496.

(k) 4 J. B. Moore, 3. See stipulation *ante*, 90.

(l) *Snook* v. *Hellyer*, 2 Chitty's Rep. 48; 4 B. & Ald. 250.

ence, or if they should forbear to attend the arbitrator, it would seem that a subsequent award would not be conclusive against the estate; (*m*) though if the assignees should adopt the arbitration, they will then be bound by the award. (*n*) When assignees of a bankrupt have agreed to refer, as we have seen they may do, after convening a meeting of creditors, and sometimes with the consent of the commissioners; (*o*) and the 1 & 2 W. 4. c. 56. s. 43, provides that the agreement of reference may be made a rule of the Court of Bankruptcy. Where a cause and all matters in difference were referred at *nisi prius* to an arbitrator, and he found that a sum of money was due from the plaintiff to the defendant, and ordered that sum to be paid to the latter: and between the time of making the order of reference and taxing costs and signing judgment the plaintiff became a bankrupt; it was held, that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged, as to that debt, by his certificate. (*p*) Hence it would be advisable for parties subject to the bankrupt laws expressly to provide in the submission that the bankruptcy of either should operate as a revocation, unless the award shall be made before any act of bankruptcy has been committed. (*q*)

Thirteenthly, of the Award.

Must conform to the authority in submission.

The award must strictly pursue the power, or it will be void, even in respect of a slight informality; as where the submission required an award under *hand*, and the award was not signed, though under seal. (*r*) So if the award was required to be under seal, and it be only signed; (*s*) and even where the award was to be made by four arbitrators, or any three of them, and the award purported to be made by the four, but was only signed by three, it was holden void. (*t*) But where an award, after reciting that *A. B.* and *C. D.* had been appointed arbitrators, and that they had appointed *E. F.* umpire, proceeded "We the said arbitrators do award, &c.," and was signed by the two arbitrators and the umpire, it was held that the latter, by signing the award, had adopted the language as his, and that the arbitrators joining in the award would not prejudice. (*u*) And an award by two out of three, under a power for two to make their award in case the three should not concur,

(*m*) *Dod* v. *Herring*, 3 Simons, 143; 1 Russ. & M. 153, S. C.; *Blundell* v. *Brettargh*, 17 Ves. 241.

(*n*) *Dod* v. *Herring*, 1 Russ. & M. 153; 3 Simon's Rep. 143 S. C.; *Marsh* v. *Wood*, 9 B. & Cres. 659; *Andrews* v. *Palmer*, 4 B. & Ald. 25.

(*o*) *Ante*, 77, 78.

(*p*) *Haswell* v. *Thorogood*, 7 B. & Cres. 705.

(*q*) See form *ante*, 89, 90.

(*r*) 2 Marsh. 304; 3 M. & S. 512.

(*s*) M. S. K. B. A. D. 1818.

(*t*) *Thomas* v. *Harrop*, 1 Sim. & Stu. 524. See form *ante*, 89.

(*u*) *Bates* v. *Cooke*, 9 Bar. & C. 407.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

suffices, if it recite the disagreement of the three, without shewing the dissent of the third under his hand. (*u*)

So if the power of an arbitrator has been limited to a *particular matter*, he cannot award beyond it; and therefore it was held that a reference to arbitrators *to balance accounts* and settle all matters in dispute *respecting the leaving and occupying of two corn-mills and a dwelling-house*, did not authorize them to decide on the *costs of an action* for fixtures, at least up to the time of paying money into Court, when the submission was entered into; (*v*) and a submission to refer a cause, and the subject-matter thereof, and the issue therein, to the award of a barrister, does not authorize him to order a verdict to be entered up; but that decision probably proceeded on the impracticability or impropriety of the arbitrators directing a feigned trial and postea in favour of the plaintiff, when the cause had not been tried, for a reference of a cause would authorize an award that the defendant should suffer a judgment. (*w*)

Must, in terms or substance, decide upon and provide for all sustainable claims referred.

On the other hand, an arbitrator must, when all matters in difference are referred to him, take care by his award, either in terms or *in effect*, to decide upon all matters of claim that were brought before him, and which are to any extent tenable; and must not, because a claim has been admitted before him, or because the parties have not pressed or even requested him to arbitrate upon the subject, omit to notice or include it in his award; for though the parties might not dispute the claim before the arbitrator, yet a general award, professedly upon all matters in difference, would afterwards preclude the party from suing for or otherwise recovering the admitted claim so unprovided for; and this constitutes an exception to the rule, that a general award, seemingly sufficient on the face of it, or at least not disclosing the defect, cannot be questioned upon the merits. (*x*) Therefore where on a reference of all matters in difference a demand on one side was laid before the arbitrators, *and immediately admitted* by the other party, and therefore no evidence was given concerning it, nor any adjudication upon it requested, and the arbitrators published their award of and concerning all matters in difference referred to them, directing payment of a sum of money, without saying on what account, to the party against whom the above claim

(*u*) *M'Callam* v. *Robertson*, 2 Wils. & S. 344.

(*v*) *Stratton* v. *Green*, 8 Bing. 437; 1 Moore & S. 668, S. C.

(*w*) *Hutchinson* v. *Blackwell*, 8 Bing. 331; 1 Moore & S. 513, S. C.

(*x*) *In matter Robson and Railston*, 1 B. & Adolp. 723; and Tidd, 9th ed. 829.

had been made, with costs; and it was established *by affidavit*, that they had left that claim out of consideration in making their award, because, as it was admitted, they erroneously thought it was not to be deemed a matter *in dispute*; it was held that the award was on that account bad, as the arbitrators ought, in their award, to have taken notice of and provided for the payment of such admitted demand. (*y*) If by the terms of the submission it is *compulsory* on the arbitrator to award *separately* upon each claim, *and to state therein* whether he determine for or against the same, his award must be framed accordingly; but when the reference is general, provided the arbitrator duly considers, and by his award provides for the payment of all sustainable claims, he need not therein notice or allude to any claim which he thinks is untenable, though it may be safer, and prevent subsequent discussion, if each claim be shortly noticed, and as concisely disposed of.

Award to do an impossible or illegal act, when valid.

Although in general an award absolutely that a party shall do a thing *impossible*, is altogether void, yet if it also give the party an alternative which he could perform, it would be otherwise. (*z*)

But an award must be final, and when deemed so.

The award must be *certain, clear, decisive, and final*. And an award that all actions shall be discontinued, (*a*) or, that nothing is due to the plaintiff, (*b*) or, that a named sum of money shall be paid to the plaintiff in the action, and that a recited bill in Chancery shall be dismissed, and that all proceedings therein shall utterly cease and determine, (*c*) or, that the plaintiff had no cause of action, (*d*) is sufficiently certain and final. (*e*) In cases where only a particular cause, or even where all matters in difference have been referred, the usual form is merely to award "that the said defendant shall, on the —— day of ——, at the "office of the attorney for the plaintiff, (naming the hour and "place) pay, and the said plaintiff accept and receive the sum "of —*l.* in full satisfaction and discharge of all the said matters "so referred to me as aforesaid," and that (according to the arbitrator's decision), "the said defendant shall at the same time "and place pay the costs of the said reference and of this my "award." And these terms are final, without more, and in that case there is not any occasion for any award of releases, which would occasion unnecessary expense. In cases, however,

(*y*) *In matter Robson and Railston*, 1 B. & Adolph. 723; and Tidd, 9th ed. 829.

(*z*) *Wharton* v. *King*, 2 B. & Adol. 528.

(*a*) 9 East, 497.

(*b*) *Dickins* v. *Jarvis*, 5 B. & Cres. 528; *Jackson* v. *Yatsley*, 5 B. & Ald. 848.

(*c*) *Pearse* v. *Pearse*, 9 B. & Cres. 484; *Cargey* v. *Aitcheson*, 2 Bar. & Cres. 170; 2 Bing. 199; 9 Moore, 381, S. C.

(*d*) *Hayler* v. *Ellis*, 6 Bing, 225; 5 B. & Ald. 861; Tidd, 9th ed. 829.

(*e*) As to the requisite certainty, &c. see cases, Tidd, 9th ed. 828.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

of considerable importance, and in order more strongly to denote that the arbitrator intends finally to determine all differences, it may be prudent to award "that each of the said parties "shall, after such payments and full performance of my award, "at the request, and at the costs and charges of the other party, "execute to him a general release of all matters in difference up "to the time of the said agreement of reference;" (*f*) for in a late intricate case it was considered that one mode of rendering an award final, was to direct that the parties should either absolutely, or upon a named payment, or other event, execute mutual releases if required, at the expense of the party requiring, or otherwise. (*g*)

Where a cause was referred to an arbitrator, with *liberty* to him to state upon his award any point of law raised by either party in reference to the matters thereby referred; and certain points of law were accordingly submitted to the arbitrator, which he set out upon his award, (but without reference to any particular state of facts), and certified that he had over-ruled them; the arbitrator's decision upon these points, as abstract propositions, being correct, the Court refused either to refer it back to him to amend his award by setting forth the facts upon which the questions of law arose, or to set aside the award. (*h*)

When not certain, or final, or defective, because it does not order payment.

But an attachment was refused upon an award which found a debt to be due, but did not contain any order to pay. (*i*) And where upon reference to a surveyor, of a cause and all matters in difference, he awarded "that the defendant had overpaid the plaintiff 34*l.*;" this was held insufficient to entitle the plaintiff to enforce the award by attachment. (*k*) The best course, when the submission so authorizes, is for the award not only to order payment on a named day, or on request, but also to direct what judgment shall be signed as a security.

A legal arbitrator may decide contrary to strict rules of evidence or law.

When a *cause* or *causes*, or a question of *law* or of *fact separately*, have been referred to a barrister, it is considered that the parties agreed to constitute him their absolute judge of law as well as fact; and if he *intentionally* decide either contrary to the strict rules of evidence, as by receiving the testimony of a person who was not a competent witness, (*l*) or against law, as denying effect to a defence upon usury or other illegality,

(*f*) *Wharton* v. *King*, 2 B. & Adolp. 528; and id. 535, cites *Birks* v. *Trippet*, 1 Saund.

(*g*) Id. ibid.

(*h*) *Jay* v. *Byles*, 3 Moore & Scott, 86. *Ante*, 87, 88.

(*i*) *Edgell* v. *Dallimore*, 3 Bing. 634.

(*k*) *Thornton* v. *Hornby*, 8 Bing. 13; 1 Moore & S. 48, S. C.

(*l*) *Perriman* v. *Steggall*, 9 Bing. 679; *Smith* v. *Sainsbury*, 9 Bing. 31; 1 Chitty's Rep. 674; 3 B. & Ald. 237; but see 1 M'Clel. & Y. 100; Tidd, 9th ed. 844.

although clearly proved before him, (*m*) this intentional decision will not be set aside, unless the legal objection be stated on the face of the award, (*n*) or appear to the Court in some other authentic way, as in writing. (*o*) But if it should appear that the arbitrator intended to decide according to law, but mistook it, and thereby made an erroneous award, the Court will in some cases interfere if there has been any real injustice.

In general, however, an arbitrator should receive and act upon legal evidence, and decide according to law or equity; because the long established rules will be found in general better to be observed than the immature and perhaps imperfect views of any single individual. But when the very object of the reference was, as frequently occurs at *nisi prius*, to avoid a legal or technical objection, and to attain a decision according to equity and good conscience, a legal arbitrator would quite mistake his province if, influenced by strict and general rules of law, he should defeat the object by adhering to formal or legal objections.

As to awarding costs.

The extent and exercise of the jurisdiction of the arbitrators over the *costs*, whether of the *cause* or of some particular proceedings in or collateral to, or connected with the cause or the costs of the reference and of the award, very frequently are the subjects of inquiry and motion to the Court, or other proceeding. Mr. Tidd's Practice is clear upon the law; and only a few other cases will here be noticed. We have seen that on general principles, the party right in the result, should be wholly indemnified from all expenses; but yet, not unfrequently, arbitrators will make each party pay half the costs of the reference, or his own costs, and pay his own fees in moieties; and where the successful party has been in a degree to blame, or has had the benefit of investigation of intricate accounts, such division of expenses may be just. The parties themselves should, before they sign the agreement to refer, take care that proper provisions are introduced, not only as regards the costs of the cause, but also of collateral proceedings; and the arbitrator, before he make his award, should make distinct inquiry how all questions of costs stand, and take care to fully exercise his powers over them, for otherwise some of the costs may be lost.

The costs of a reference and award, under an order of *Nisi*

(*m*) *Cramn* v. *Symonds*, 1 Bing. 104; 7 J. B. Moore, 434, S. C.; 13 East, 357; 1 M. & Sel. 105; 5 M. & Sel. 504; 1 D. & Ry. 366; 6 Taunt. 254; 9 Moore, 668.

(*n*) Id. ibid.

(*o*) 2 Young & J. 115.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

Prius, are not costs in the cause, and consequently would not be recoverable unless expressly provided for by the arbitrator. (*p*) But where, in an action of trover, a verdict was taken for the plaintiff to the full amount of the goods converted, the plaintiff consenting to take them back in reduction of damages, upon its being referred to an arbitrator by order of *Nisi Prius*, to ascertain the amount of deterioration, and which amount with the costs in the cause were, by the order, directed to be paid to the plaintiff, it was held, that the expense of witnesses attending the arbitrator were costs in the cause. (*q*) And where an arbitrator to whom it was referred to certify what verdict should be entered up, certified for the plaintiff, and orally communicated to the parties, that each should pay his own costs of the reference, which was acceded to by them; and the cause having afterwards been referred back to the arbitrator, he certified in the same way a second time, but omitted to give any direction as to the costs of the second reference: it was, nevertheless, held that the plaintiff was entitled to those costs. (*r*) Where a verdict had been found for the *defendant*, and a rule for a new trial was obtained, and thereupon the cause was referred to a barrister, and the costs of the cause were to be in his discretion; and he found that the plaintiff was entitled to recover, and ordered the defendant to pay the costs of the cause; yet it was held that the plaintiff was not entitled to the costs of the first trial. (*s*) And it has been laid down, that when a rule for a new trial is silent as to costs of the first trial, and the cause is afterwards referred at *Nisi Prius*, and determined in favour of the plaintiff, he is not entitled to the costs of the first trial. (*t*) And where a defendant was arrested, and holden to bail for 28*l.*, and paid 2*l.* into Court, and afterwards the cause before it came on for trial, and all matters in difference, were referred to an arbitrator, who had power to examine the parties, and call for books, &c., and it was agreed that the costs should abide the event, the arbitrator having awarded to the plaintiff the sum of 1*l.* 19*s.*; a motion was made to allow the defendant his costs: it was held that this was not a case within the 43 Geo. 3, c. 46, s. 3, and that the defendant was not entitled to costs. (*u*) So the Court also refused the defendant his costs, where the arbitrator had awarded that the plaintiff should pay a named sum to the

(*p*) *Taylor* v. *Gordon*, 9 Bing. 570.
(*q*) *Tregoning* v. *Attenborough*, 7 Bing. 733; 5 M. & P. 453, S. C.
(*r*) *Mackintosh* v. *Blyth*, 1 Bing. 269; 8 Moore, 211, S. C.
(*s*) *Rigby* v. *Okell*, 7 Bar. & C. 57.
(*t*) *Summers* v. *Formby*, 1 Bar. & Cres. 100.
(*u*) *Keene* v. *Deeble*, 3 Bar. & C. 491.

defendant for the vexatious arrest. (*v*) And where a cause and all matters in difference were referred to an arbitrator, and nothing was said about costs, it was held that although the arbitrator had power over the costs of the cause, yet that he had not over those of the reference; (*w*) and when by a rule for setting aside an inquisition before the sheriff for excessive damages, the matter was referred, and nothing was said about the costs of the application, and the arbitrator by his award reduced the damages, it was held that the plaintiff was not entitled to the costs of the application. (*x*)

The form of awards.

There is not in general any prescribed form of award; we have seen how it should be *substantially* framed, and numerous precedents will be found published to assist in various cases, but the award must necessarily vary according to the circumstances of each particular case. (*y*) Subscribed is a concise form which will in general apply; and the forms of awards finding the facts and points of law specially for the opinion of the Court, and which may be readily applied to any case that may arise, will also be found in the note. (*z*)

(*v*) *Thompson* v. *Atkinson*, 6 B. & Cres. 193.

(*w*) *Firth* v. *Robinson*, 1 Bar. & Crys. 277.

(*x*) *Lewis* v. *Harris*, 2 Bar. & C. 620.

(*y*) See several precedents in Tidd's Forms; Watson on Arbitrations, Appendix; and the very full collection in Chitty's Commercial Law, 4 vol. 372 to 400.

Common forms of an award, in favor of a plaintiff, upon a reference of a cause and all matters in difference.

(*z*) To all to whom these presents shall come, I, *X. Y.*, of , Esquire, barrister at law, send greeting: Whereas at the sitting at *Nisi Prius* after term last, holden at the Guildhall of the city of London, on before the Right Honourable Lord Chief Justice of his Majesty's Court of at Westminster, a certain order was made in a certain cause then depending in the same Court, wherein *A. B.* was and is plaintiff, and *C. D.* was and is defendant, whereby, amongst other things, it was ordered by the said Court, by and with the consent of the said parties, their counsel and attornies, that a verdict should be entered for the said plaintiff, damages 500*l* and costs 40*s*., but that such verdict should be subject to the award, order, arbitrament, final end and determination of me, the said *X. Y.*, who was thereby empowered to direct that a verdict should be entered for the plaintiff or the defendant, as I should think proper, and to whom *the said cause* [*depending on the fact*, "*and all matters in difference* between the said parties respectively"] were thereby referred, so as I, the said arbitrator, should make and duly publish my award in writing of and concerning the matters referred, ready to be delivered to the said parties, or to either of them, or if they or either of them should be dead before the making of my said award, to their respective personal representatives who should require the same, on or before the ——— day of ——— then next ensuing, or on or before any other day to which I the said arbitrator should by any writing under my hand from time to time enlarge the time for making my said award. And whereas the time limited for making my said award hath been duly enlarged until the ——— day of ——— next. Now know ye, that I the said *X. Y.* having taken upon myself the burthen of the said reference, and having heard, examined, and considered the several allegations and proofs of the said parties respectively, do thereupon make this my award in writing concerning the same in manner following, that is to say; I do award and adjudge and determine of and concerning the said matters so referred to me as aforesaid, that before and at the time of the commencement of the said action, and at the time of the making of the said reference, there was and still

Recital of order of *Nisi Prius*.

Time enlarged.

Hearing of parties and evidence.

Award.

In causes of small importance, or when the mere quantum of damages is referred to a barrister, and there is little proba-

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Fourteenthly, Of a certificate in lieu of an award.

is justly due from the said defendant to the said plaintiff the sum of ——*l.*, and I do award and direct that a verdict shall be entered in the said action for the said plaintiff for that sum, and that the said defendant do and shall pay the said sum of ——*l.* to the said plaintiff, and the said plaintiff shall accept and receive such payment from the said defendant in full satisfaction and discharge of *all matters in difference between the said parties* to the time of making of the said order of *Nisi Prius.* And I do further award, order, and direct that the said defendant do and shall pay all the costs of the said reference and of this my award; and that if the said plaintiff shall pay the same, or any part thereof, then the said defendant shall forthwith repay and reimburse the same. And I do further direct and award, that after payment by the said defendant of the said sum of money, and of the costs of the said reference and of this my award, as aforesaid, each party shall, if required so to do, at the request, costs and charges of the other of them, but not otherwise, execute to him a good and sufficient release of and concerning all and every of the said matters so referred to me as aforesaid. In witness whereof I have hereunto subscribed my hand, this —— day of ——, in the year of our Lord 1833.

X. Y.

Signed and published by the said arbitrator, as his award, on this day —— of —, A. D. 1833, in the presence of me,

G. H.

An award under an order of *Nisi Prius* for plaintiff, but subject to facts for the opinion of the Court, with a report of the decision of the Court thereon alluded to *ante*, 1 Vol. 300, 1.

[Recite the order of *Nisi Prius* and the enlargement of time, as in the last form, and then proceed:] Now I the said arbitrator, having heard and examined the proofs and allegations of the parties, do make and publish this my award in writing as follows; (that is to say,) I award that the verdict entered for the said plaintiffs do stand, but that the damages be reduced to 104*l.* 18*s.* 8*d.*; and I find that the plaintiffs have paid the above sum to their attorney, Mr.   and his surveyor, being their fair and reasonable charges and expenses in ascertaining the value of certain real property of the defendants, situate at   which property the defendants had, before the incurring of the said expense, offered to mortgage to the plaintiff; and I find as a fact that the defendants, before the above expense was incurred, agreed in writing with the attornies of the plaintiffs in the terms following:—

"We beg to say that we consider our negociation with Mr.   of your firm "for the mortgage of property at   as closed, subject to the approval "of Mr.   and his surveyor of the security, and we engage to pay their fair "and reasonable expenses in ascertaining the value of the property." I consider that in this agreement the understanding of both plaintiffs and defendants was that the said expenses were to be borne by the defendants *at all events,* although the proposed mortgage was ultimately not completed, and although such non-completion should arise from the fault of the plaintiffs; and I certify that the mortgage was ultimately not completed, and that I consider that such non-completion did arise from the fault of the plaintiffs, and that my award is founded on the above-mentioned facts; and as to the non-completion of the said mortgage, I find that after the said last-mentioned expense had been incurred, *I. K.* and *L. M.*, as attornies for the plaintiffs, and *O. P.*, as attorney for the defendants, agreed in writing in the following terms: "*I. K.* and *L. M.*, on the behalf of their clients, have agreed, and "*O. P.* on the behalf of his client, to advance them by way of mortgage of the "   property the sum of 20,000*l.* sterling at 4*l.* per cent. interest, subject to "the approval of the title, and the execution of such mortgage securities as shall be "recommended and approved of by their conveyancer." The conveyancer of the plaintiffs recommended that a receiver of the rents and profits of the estate should be appointed, who should pay the interest to the plaintiffs and effect such insurances as should be stipulated for by the terms of the mortgage deed, and pay the residue over to the defendants, such receiver to take the rents and profits whether or not default should have been made in the payment of the interest or in the effecting of the insurances. And I find as a fact that this recommendation of the conveyancer was not made on account of any defect in or difficulty arising from the title of the defendants, but only on account of the nature of the property itself. The defendants refusing to consent to the appointment of such a receiver, the plaintiffs refused to advance the money, and for this reason the mortgage was not completed. I consider that the plaintiffs were not entitled by the agreement to insist upon the appointment of such a receiver, and that therefore the non-completion of the mortgage *arose from the fault of the plaintiffs* And I further find that the plaintiffs were

bility of the necessity for any motion to set aside the award; it is usual, in order to save the expense of a formal award on

nut to the further expense of 26*l.* 5*s.* by the negociations respecting the mortgage, which sum I do not consider that the plaintiffs are entitled to recover, and therefore do not allow the same. But if the plaintiffs be entitled to recover both the abovementioned sums, then I direct that the verdict be entered up for 131*l.* 3*s.* 8*d.*; and if the plaintiff be not entitled to recover the said sum of 104*l.* 18*s.* 8*d.*, but be entitled to recover the said sum of 26*l.* 5*s.*, then I direct that the verdict be entered up for 26*l.* 5*s.* And I further award that the costs of the reference and of this my award be borne by the defendants; but if the plaintiffs be not entitled to recover either of the above sums, then I direct that the verdict found for the plaintiffs be vacated, and the verdict be entered for the defendants; and that the costs of the reference and of this my award be borne by the plaintiffs. In witness whereof I have hereunto set my hand, this 30th day of July, A. D. 1829.

(Signature of arbitrator)—*X. Y.*

Signed and published (being first duly stamped), in the presence of

W. C.

St. Leger and another v. *Robson and another.* Upon the trial, the cause was referred to a barrister, who awarded in the above form; and upon motion to the Court to set aside the award, the Court directed the award to be stated in a *case* for the opinion of the Court; and after argument of Mr. Wyburn for the plaintiff and Mr. Platt for the defendant, the Court gave judgment for the defendant as follows on 30th April, A. D. 1831.

Lord Tenterden, C. J., said, the *first question* is, whether the agreement was to pay the expense of ascertaining the value of the property *at all events;* and although the negociation went off by the fault of the plaintiffs, I am of opinion that the arbitrator was mistaken on that part of his award. The second question is, whether by the terms of the *second* agreement, the plaintiffs were entitled to insist on the appointment of a receiver. The arbitrator thought they were not, and in that opinion I concur. The words "*securities,*" in the second agreement, referred to the land and the deeds. A receiver is not usual, and it cannot be supposed to have been intended by the parties to the agreement that a receiver should *at all events* be appointed. I think the verdict should be entered for the defendants.

Littledale, J.—If the plaintiffs were justified in insisting upon an immediate receiver, then they would have been entitled to the expenses; but a receiver might be very objectionable.

Parke, J.—I am of opinion that the plaintiffs are not entitled to recover. In construing the first agreement the arbitrator is wrong. It is clear a good title has been made out, and that the plaintiffs had agreed to advance the money. Then as to the receiver, the arbitrator was perfectly right; but I think the award is wrong in allowing any expenses to the plaintiffs, and that the verdict should be entered for the defendants.

Patteson, J.—It seems to me quite clear that the plaintiffs are not entitled to recover on the first agreement. It cannot be supposed that a receiver was contemplated by the second agreement. I am of opinion that the verdict should be entered for the defendants.

Award, finding facts and adjudging upon them, in form analogous to a special verdict.

Now therefore know ye that I the said , do award, order, and adjudge, that if the Court in which the said action is brought, shall be of opinion, and adjudge upon the facts and matters found, and stated by me upon this my award as aforesaid, that the said plaintiff , is a proper and sufficient party to bring and maintain the said action against the said defendant; and that there is and appears a sufficient consideration for the said promissory note, to enable the said plaintiff to maintain the said action against the said defendant, and that the said action is not barred by the statute of limitations, as pleaded by the said defendant to the said action, then the verdict already entered up for the plaintiff shall stand, but the damages shall be reduced to the sum of two hundred and seventy-nine pounds fourteen shillings, with interest upon the sum of two hundred and fifty pounds, after the rate of five pounds per centum per annum, from the fourth day of Easter term now present, to the day when final judgment shall be signed in the said action; but if the said Court shall be of opinion and shall adjudge, that upon any of the grounds aforesaid, the said action cannot be maintained by the said plaintiff against the said defendant, then and in that case the said verdict for the plaintiff shall not stand, but a nonsuit shall be finally entered. And I hereby direct, order, and adjudge, that both or either of the said parties shall and may be at liberty forthwith to apply to the said Court, to obtain the opinion and

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

stamps, to take the verdict generally for the damages in the declaration, with an authority to a named counsel *to certify* the amount; and in that case, after hearing the witnesses precisely as in an ordinary reference, he will return his certificate to the Judge's marshall, in order that he may enter the verdict accordingly. In that case the certificate may be in the subscribed form. (c)

When an award may be good in part, and void as to the residue

It is settled at law (d) as well as in equity, (e) that an award may be good in part, and bad in part, when the subjects are clearly capable of being separated; but not where all the matters are within the submission, and the award is upon the face of it entire; (e) and supposing, in a reference of a cause and of all mat-

judgment of the said Court upon the matters aforesaid, in such form and manner as the said Court shall please to direct or permit. And I do further award, determine, and adjudge, that the said is not indebted unto the said party to this reference, for or on account of any matter or thing in relation to the said farm called , and the premises demised by the said indenture of lease as aforesaid, or for or on account of the proceeds thereof; and I order, award, and direct, that the costs of this reference up to, and including the hearing before me on the thirtieth day of August last past, at York, shall abide the event of the cause, but that the subsequent costs of the said reference shall be paid by the said plaintiff, on or before the first day of June next ensuing, and shall be allowed to him the said plaintiff, by the said , out of the proceeds of the said farm, lands and premises, demised by the said indenture of the day of , A. D. , upon trust as aforesaid, and that the sum of twenty-five pounds, being the costs of making this my award, shall be paid in equal moities, one moiety thereof by the said plaintiff, and the other moiety thereof by the said defendant; and that upon payment by the said plantiff of such of the costs of reference as are directed to be paid by him as aforesaid, the said shall, if required by the said plaintiff so to do, execute and deliver to him the said plaintiff, a general release in writing, under the hand and seal of him the said of all and all manner of action and actions, suit and suits, cause and causes of action and actions, suit and suits, duties, accounts, reckonings, claims and demands whatsoever, from the beginning of the world until the day of the date of the aforesaid order of reference. In witness whereof, I the said *R. M.*, the arbibrator aforesaid, have hereunto set my hand this day of A. D. .

Award of release.

(Signature of the arbitrator)—*R. M.*

Form of a certificate instead of an award.

(c) " To the Marshal of the *Exchequer*,"

" In the Exchequer of Pleas."

A. B. - - Plaintiff.
&
C. D. - - Defendant.

I hereby certify, that in my opinion, a verdict should be entered for the plaintiff in the above cause, for damages Fifty-five pounds nineteen shillings; and if I am empowered so to do, I certify that it is my opinion, that the said defendant ought to pay, and shall pay, all the costs of this action from the commencement thereof to the present time, and all costs incident or collateral to the same, together with the costs of the reference to me, and of this my certificate. (*)

G. H.
Arbitrator.

Nov. 20, 1832.

(d) See cases, Tidd, 9th ed. 829, 830; and the law of Scotland is the same; see 2 Dow's New Ser. 121.

(e) *Auriol* v. *Smith*, 1 Turn. & Russ. 128

(*) *Mackintosh* v. *Blyth*, 1 Bing. 26; 8 Moore, 211, S. C.; *Rigley* v. *Okell*, 7 Bar. and Cres. 57.

ters in difference, the arbitrator should correctly award in favour of the plaintiff as to the amount of his claims, but neglect to allow the defendant's available set-off, then although the claims are cross and distinct, yet the whole award would be bad, because the defendant had a right to the benefit of his set-off, in reduction of the plaintiff's claim. (*f*)

Award, when published.

An award is to be considered as *published* and ready to be delivered, when the parties have notice that it is ready for delivery on payment of the arbitrator's reasonable charges. (*g*) But if an arbitrator should refuse to deliver his award until after the time for making it had expired, unless an unreasonable fee were paid, he would perhaps incur the risk of his award being altogether invalid, for want of delivery or publication within the limited time.

No amendment of an award.

In general, when an award has been delivered as his award, the arbitrator is *functus officio*, and cannot afterwards alter it even to correct a mistake, unless the parties will concur in referring the award back to him to correct the mistake. (*h*) But where the arbitrator attempted to alter the award, and it was still legible in its original state, it was allowed to operate accordingly, the alteration being considered a wrongful but inefficatious spoliation. (*i*) The Court cannot interfere to *alter the terms of an award*, in order to make them consist with the submission, even where the submission to arbitration gave minute directions for the course to be pursued by the arbitrator. (*k*) And where a barrister awarded that the plaintiff had no cause of action, and that a verdict should be entered for the defendant, and then *by mere mistake of the names*, directed that the costs of the reference and award should be paid by the "*defendant*," meaning the plaintiff; although these facts were disclosed by the arbitrator's certificate and by affidavits, yet it was held that the arbitrator having executed his award in this form, could not rectify it. (*l*) Hence, the greatest care should be observed in drawing up an award. With reference to the

(*f*) *Semble*, and see *Matter of Robson* v. *Railstone*, 1 B. & Adolph. 723.

(*g*) *Musselbrooke* v. *Dunkin*, 9 Bing. 605; 4 East, 584; 6 East, 310.

(*h*) 7 Dowl. & Ry. 774.

(*i*) 6 East, 509; 8 East, 54; 11 East, 369.

(*k*) *Hall* v. *Alderson*, 2 Bing. 476.

(*l*) *Ward* v. *Dean*, 3 B. & Adolph. 234. And where a barrister, in summing up the items proved before him as arbitrator, misadded them, and thereby by mistake omitted 23*l*. in favour of the plaintiff, the Court, even at the instance of the barrister, would not allow an amendment, the defendant's counsel objecting. In matter *Pullen*, M. S. M. T. A. D. 1825. But see, as to omission of a sum by mistake, *Rogers* v. *Dallimore*, 6 Taunt. 111, and *Anonymous*, 2 Chit. R. 44.

practice in granting new trials, and to the ancient statutes of Jeofails, amendments of obvious mistakes should be permitted by some express enactment.

Fifteenthly, Of setting aside awards.

An award having been made and published, the first consideration on the part of the person prejudiced by it, should be, whether by any and what means it can be set aside. If the submission cannot by its terms be made a rule of Court, then the only course will be to resist an action, or to file a bill in equity, and the grounds are but few upon which relief can be obtained; and if the award be seemingly upon the *face* of it correct, relief upon the merits, or *facts*, can rarely be obtained, excepting indeed in cases of *fraud*, or grossly *corrupt or irregular misconduct of the arbitrator*.

But our observations will here be confined to those most frequent submissions, which provide that they shall be made a *rule of Court*. In those cases the statute authorizes relief "where any arbitration or umpirage has been procured by *cor- "ruption or undue means*, so as complaint of such corruption or "undue practice be made in the Court where the rule is made "for submission to such arbitration or umpirage, *before the last "day of the next term after such arbitration or umpirage made "and published to the parties*." (*m*) It is therefore incumbent on the party objecting to an award, to make the submission a rule of the proper Court, if not already done by himself or the opponent, and then to move the Court *before the expiration of the prescribed time*; and if he miss that time, neither a Court of Law nor of Equity has in general power to interfere; though if the award be illegal *on the face of it*, it may not be enforceable. In general, a party objecting to an award should move to set it aside *as soon as practicable*, for there are many cases where valid objections to the award would nevertheless form no answer to an application to enforce its performance. (*n*)

Upon what grounds an award can or not be set aside on motion. (*o*)

The principles and grounds upon which relief against an award will be granted or refused, are the same at law as in equity, and the decisions will therefore in general be analogous and equally applicable. The statute 9 & 10 W. 3. c. 15. s. 1, as regards *awards* made a *rule of Court*, enacts, that the disobedience may be treated as a contempt of Court, and process accordingly may be issued, and which shall not be stopped or delayed by any order, rule, command or process, of any other

(*m*) See the statute, *ante*, 81, 82.

(*n*) *Brazier* v. *Bryant*, 3 Bing. 167; *Dick* v. *Milligan*, 4 Bro. C. C. 117; 2 Ves. J. 23, and *post*. 123, note (*o*).

(*o*) See in general, Tidd. Prac. 9th ed. 841 to 847, and Supplements.

Court of Law or Equity, "unless it be made appear on oath that "the arbitrator or umpire *misbehaved* themselves, *and* that such "award was procured by *corruption or other* UNDUE MEANS." This enactment was clearly intended to give a summary and *final* jurisdiction, and to preclude appeal, excepting in the two cases of *corruption*, or *undue means;* but as the latter words are capable of very extensive construction, that circumstance has given rise to very various decisions.

A Court of *Equity* will not, upon a bill filed, set aside an award on a question of *fact*, excepting for *corruption, partiality,* or *irregularity of conduct*, in the arbitrator; (p) and evidence of the *merits* is only to be received so far as it may throw light on the conduct of the arbitrator, in order to establish one of those objections; (q) for, as regards the investigation of *fact*, it is a principle in all the Courts to abide by the decision of the judge, chosen by the parties themselves to decide upon the *facts*, although such decision be clearly shewn by affidavits to have been erroneous (r). And when the arbitrator is a *Barrister*, they will also suppose that the parties selected him to decide upon *the law* between them; (s) and therefore, in such case, the Court will not set aside the award, on the ground of a *mistake* in point of *law;* (t) or on account of his having incorrectly rejected or admitted the evidence of a witness; (u) and such an arbitrator may relieve against a *harsh right*, although the same must, in a Court of justice, have prevailed. (v) It has indeed been laid down, that where legal rights are referred to arbitration, the award must be according to law, or it will not be binding. (w) But when a matter has been referred to a barrister, this must be understood with considerable qualification; and the rule seems rather to be, that if such barrister, under a general reference, *meaning to decide according to law*, should mistake the law, then the Court may set aside his award; but that in general, when he being fully aware of the law, nevertheless thinks fit to decide *against the same*, or rather refuses to apply it to the facts before him, then the award, though not according to law, cannot on that

(p) *Goodman* v. *Sayers*, 2 Jac. & W. 249; *Morgan* v. *Mather*, 2 Ves. J. 15.

(q) Id. 259.

(r) Id ibid.; and see a strong case, where 380*l.* were awarded against a tenant for life, for not repairing; and on motion to set aside the award, affidavits established that pending the reference all requisite repairs had been done, yet the Court refused relief; *Brown* v. *Brown*, 1 Vern. 157; 2 Ch. Cas. 140, S. C. But sometimes after discovered evidence has induced the Court to relieve, *Eardley* v. *Otley*, 2 Chit. R. 42, *post* 120, note (q).

(s) *Wood* v. *Griffith*, 1 Swanst. 43 to 55.

(t) *Stiff* v. *Andrews*, 2 Mad. 6; *Ridout* v. *Paris*, 3 Atk. 494; *ante*, 107, 8.

(u) *Campbell* v. *Twemlow*, 1 Price R. 81; *Perryman* v. *Steggall*, 9 Bing. 679; 1 Chit. Rep. 674; *ante*, 107, 8.

(v) *Knox* v. *Symmonds*, 1 Ves. J. 369; 3 Bro. C. C. 358, S. C.

(w) *Blennerhasset* v. *Day*, 2 Ball & B. 120.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

account be impeached. (*x*) But if an arbitrator exceed his jurisdiction, then as regards the excess, his award may be set aside, and this where it was *verbally* agreed by the parties, that he might award on granting a lease, the verbal covenant being void by the statute against frauds. (*y*)

As to *what Misconduct* of an arbitrator may induce a Court to set aside his award, it will be obvious that it ought to have been of such a nature as probably to have affected the decision *on the merits and justice* of the case, at least that is the rule in the Court of Chancery; (*z*) as if the arbitrator proceed without due notice of the meetings before him (*a*), or examine premises in the absence of the parties, (*b*) or if a party, even so late as two or three days before the time for making the award expired, requested the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him, and the arbitrator refused. (*c*) So where the arbitrator promised to hear witnesses, but made the award before he had heard them; (*d*) so where an arbitrator received evidence after having given notice to the parties that he would receive no more, and this in the absence of a party who, if present, might by examination have qualified such evidence. (*e*) So, private meetings of the arbitrators with one of the parties, and admitting him to be heard, to induce an alteration in the award, was considered such partiality, as to vitiate and induce the Court to set aside the award; (*f*) and where it appeared that the arbitrators were interested in the cargo touching which the award was to be made, the Court set the award aside. (*g*)

But although it has been decided that all the witnesses of the party, against whom an award is made, should regularly be examined, and in his presence, if he require, so that he may have them cross-examined, or it would be ground for setting aside the award, (*h*) yet in a subsequent case it was ruled, that the *mode of conducting* an arbitration must be left to the arbitrators; and that if they, after the first or second meeting, *exclude* both the parties and their attorneys, and examine witnesses privately, at their [the witnesses] houses, it seems that such conduct is

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(*x*) See *at law*, *Cramp* v. *Symons*, 1 Bing. 104; 7 Moore, 434; and in *equity*, *Young* v. *Waller*, 9 Ves. 364; *Ching* v. *Ching*, 6 Ves. 282.

(*y*) *Walters* v. *Morgan*, 2 Cox, 369; 9 Moore, 388.

(*z*) *Lingood* v. *Eade*. 2 Atk. 501, 504.

(*a*) *Anonymous*, 2 Chitty R. 44; 1 Salk. 71.

(*b*) Id. ibid.

(*c*) *Spettigew* v. *Carpenter*, 3 P. W. 362; 1 Dick. 66, S. C.; *sed quære*.

(*d*) *Earl* v. *Stocker*, 2 Vern. 251.

(*e*) *Walker* v. *Frobisher*, 6 Ves. 70.

(*f*) *Barton* v. *Knight*, 2 Vern. 514.

(*g*) *Earl* v. *Stocker*, 2 Vern. 251.

(*h*) 4 Price, 232.

no ground of objection, provided it does not proceed from *corrupt motives:* and that, at all events, if either party would take advantage of it, he must give notice *at the time*, that he intends to rely on it as an objection; and if he lie by and suffer other meetings to take place, and when the arbitrators are ready to make their award, revoke his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award. (*i*)

When not.

But although it is *irregular* for two arbitrators to meet without notice to the third arbitrator, yet that objection is not a sufficient ground to set aside the award, when the substance was settled in his presence; (*k*) nor would the admission of an arbitrator, that if he had seen a mislaid letter, afterwards found, he would have awarded differently, be sufficient to induce a Court to interfere. (*l*) Nor will an award be set aside on the ground that the arbitrator has been *assisted* in his conclusions upon fact or law by the opinion of others. (*m*) Nor will an erroneous recital in an award vitiate, unless it should necessarily lead to a conclusion, that the arbitrator has made a material mistake. (*n*) And we have seen that a distinct award upon two or more subjects, with a decision as to one upon the face of the award incorrect, or beyond the jurisdiction, will, unless the whole is necessarily connected, only vitiate the incorrect part of the award; and only that part will be set aside. (*o*) In general, it is required that a material mistake in fact or law, admitted by an arbitrator to have been made, must be verified by some written document, and not merely established by affidavit; but to construe that rule rigidly, would be a protection for concealed error, however gross and unjust.

In equity, it is a principle that no bill will lie to set aside an award on a question *of fact* within the province of the arbitrators, and decided by them, because they are the judges chosen by the parties. And as the statute supposes only two cases of relief, *viz.* an award obtained by *corruption, or undue means*, no Court of Law or Equity has any cognizance of the matter in any *other case* by way *of appeal* from the arbitrator's decision; and the consequences of assuming such a jurisdiction would be most mischievous, and if allowed to be assumed, the result would be, that applications to set awards aside, upon the

(*i*) *Hewlett* v. *Laycock*, 2 Car. & P. 574. Per Abbott, C. J. *sed quære.*

(*k*) *Goodman* v. *Sayers*, 2 Jac. & W. 261.

(*l*) *Anderson* v. *Darcy*, 18 Ves. 447.

(*m*) *Hopcroft* v. *Hickman*, 2 Sim. & Stu. 130; *Emery* v. *Wase*, 5 Ves. 848.

(*n*) *Watkins* v. *Philpotts*, 1 M'Clel. & Young, 397, 399.

(*o*) *Hartnell* v. *Hill*, Forrest Rep. 75; 9 Moore; 2 Young & J. 115; 2 Mad. Ch. Pr. 714.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

merits, would be continually made upon very frivolous grounds. (p) It is therefore established, that a Court of Equity will not interfere to set aside an award except for *corruption, partiality*, or *irregularity* of conduct in the arbitrators; and evidence of the merits is never permitted for the purpose of shewing what the merits were, excepting as they may tend to shew such a case of *misconduct*, on the part of the arbitrators, as would give a Court of Equity *jurisdiction*. And although it is irregular for two of three arbitrators to meet, and still more to sign an award, without notice to the third; yet that is not a sufficient ground to set aside the award when the *substance* was settled in his presence (p).

And though cases of *newly discovered* evidence, or of *fraud*, may induce a Court of Law or Equity to open an award upon a matter of fact, still the party must come to the Court promptly and within the statutable time. (q)

Exceptions in practice.

Such are the general *assigned rules* respecting the interference of the Courts; but it must be confessed, that in the application of these rules, there is not so much *certainty*. For when even barristers have made awards, either mistaken in law or in fact, if, after hearing the affidavits on both sides, it is manifest that *injustice* to any *considerable* extent would be suffered if the award should be allowed to stand, the Court will sometimes, in favor of justice, deviate from the general rule, and set aside the award; so that, in cases of gross mistake or injustice, it may be at least prudent for the party affected, to endeavour to obtain relief.

When, or not, the Court will interfere to set aside an award, void on the face of it.

Where an award is void upon the face of it, and nothing could be done upon it without suit, the Court will not interfere to set it aside, because such suit must fail; and it would, consequently, be unnecessary and useless to set aside any instrument that cannot prejudice. But where a cause has been referred by order of *Nisi Prius*, and the arbitrator had power tc order a verdict to be entered for either party, and he erroneously makes an award ordering a verdict to be entered, then, although such award be void, the Court would set it aside; for, otherwise, the party against whom it was made, would have judgment against him upon the verdict without the possibility of redress. (r)

Not after a party objecting has adopted an award.

A party, after receiving the costs of a reference and award, which by the terms of a rule of reference were to be paid by the other party, cannot move to set aside the award. (s)

(p) Per Master of Rolls, *Goodman* v. *Sayers*, 2 Jac. & W. 249, 259.

(q) *Eardley* v. *Otley*, 2 Chitty's Rep. 42; *Auriol* v. *Smith*, 1 Turn. & Russ. 127; *Mitchell* v. *Harris*, 2 Ves. J. 135; 4 Bro. C. C. 3.

(r) *Doe dem. Turnbull and others* v. *Brown*, 5 Bar. & C. 384.

(s) *Kennard* v. *Harris*, 2 Bar. & Cres. 801.

Time, within which to move to set aside.

The motion to set aside an award, we have seen, must be before the last day of the term next after the time of making the award; (*t*) and where a cause has been referred by order of *Nisi Prius*, a motion to set aside the award must be made within the time allowed for moving for a new trial, unless a sufficient reason for delay be shewn. (*u*) So that when an award upon such an order has been made in vacation time, the party objecting should move within the first four days of the next term; and, in other cases, before the rule for judgment has expired. (*u*) Where an award was made after the essoign day of a term, but before the *quarto die post*, it was held, that it was made within the term, and that a motion to set it aside might be made at any time before the last day of the term *next* following. (*v*) The statute is construed strictly in equity, as well as at law; (*w*) and although the defendant gave the plaintiff to understand he intended to move to set aside an award between them, and thereby the plaintiff, who intended to make the same motion, was induced to allow a term to elapse, and then moved, the defendant having omitted to do so: this was held to be no sufficient excuse for the delay. (*x*) And where accounts, between trustee and *cestui que trust*, were referred to arbitration, and the submission was made a rule of a Court of Law, then, although there had been fraudulent misrepresentation by the trustee to the arbitrator, as to particular items of the account, yet it was decided that a bill in equity could not be maintained by the *cestui que trust* after the time limited by the statute had elapsed to set aside the award, as to the items impeached, leaving it to stand as to the remaining items; the award, upon the face of it, being entire; for though the Court might, where there was a palpable objection upon the *face of an award*, refuse to *enforce* it, they could not set it aside after the time limited by the statute had expired. (*y*) We have further seen, that a party who intends to move to set aside an award, must take care to do nothing which in part adopts it, as the receiving awarded costs. (*z*)

Practical proceedings to set aside awards.

Submission must be made a rule of Court.

Before any proceedings at law or in equity, to set aside an award, the submission must be made a rule of the Court in which the motion is to be made; (*a*) though an award made

(*t*) 9 & 10 W. 3, c. 15, s. 2, *ante*, 81, 82.

(*u*) *Ramshaw* v. *Arnold*, 6 B. & Cres. 629.

(*v*) *In re Burt*, 5 Bar. & Cres. 668.

(*w*) Cowp. 23; 2 T. R. 781; 1 East, 276; 8 East, 465; 1 Moore, 471; 9 Ves. 453.

(*x*) *Emet* v. *Hogden*, 7 Bing. 258.

(*y*) *Auriol* v. *Smith*, 1 Turn. & Russ. 121, 126.

(*z*) *Ante*, 120, and *Kennaird* v. *Harris*, 2 B. & Cres. 801.

(*a*) *Chicot* v. *Lequesne*, 2 Ves. 315.

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

under an order of the Court of Chancery, need not be made a rule of that Court, although there be also bonds of arbitration executed in pursuance of such order. (*b*)

Rule *nisi*, when must state the objections.

At law and in equity, the objections against an award ought to be specified in the rule *nisi*, obtained for the purpose of setting it aside; (*c*) but an omission in that respect is not conclusive to preclude the Court from entertaining the objections. (*d*) But where a cause, and all matters in difference, were referred to arbitration, and a motion was made to set aside the award, on the ground that the arbitrator had not decided upon certain matters in difference: it was held, that it was not necessary to state these matters in the rule, inasmuch as they were specified in the affidavit upon which the rule was obtained. (*e*) And in moving to set aside an award made under a rule of Court, the rule *nisi* ought to be drawn up on reading the prior rule under which the matter was referred, and the objections to the award ought to be specified. (*f*) In all the Courts, by the established rules of practice, questions on awards are not to be moved for, argued, discussed, or heard, on the *last* day of the term. (*g*) If a motion for setting aside an award be made on slight grounds, the rule will in general be discharged with costs (*h*).

Sixteenthly, Proceedings to enforce performance of an award.

1. By attachment.

Sixteenthly, The party in whose favour an award has been made, has in general the choice of two modes of enforcing obedience, as *first*, by motion for an *Attachment*; or, *secondly*, *by Action*. If he adopt the former, he should first see that the submission has been made a rule of the proper Court, according to the terms of submission, and that such rule has been duly shown to the party, and a copy thereof left; also that the original award has been shown to the party; and it would be advisable also that a copy thereof should be left; and also in case of taxed costs the original *allocatur* should be shown to the party, and a copy thereof left; also that a demand of payment or of performance has been made personally upon the party who ought to perform, and by the party in person to whom the payment or performance ought to be made, or by a person to whom a power of attorney has been duly executed, authorizing and re-

(*b*) *Marquis Ormond* v. *Kynnersley*, 2 Sim. & S. 15.

(*c*) In C. P. *Dicas* v. *Jay*, 5 Bing. 281, Rule M. 10 G. 4, C. P.; 6 Bing. 348. In Exchequer, Plea and Equity side, *Watkins* v. *Phillpotts*, 1 M'Clel. & Y. 394; 11 Price 57, S. C.

(*d*) *Dicas* v. *Jay*, 5 Bing. 281; 2 Moore & P. 448; but note that was before the Rule 10 Geo. 4, *supra*, note (*c*).

(*e*) *Ramshaw* v. *Arnold*, 6 Bar. & C. 629; *sed quære*.

(*f*) *Christie* v. *Hamlet*, 5 Bing. 195.

(*g*) *Watkins* v. *Phillpotts*, 1 M'Clel. & Y. 393.

(*h*) *Snook* v. *Hellyer*, 2 Chitty R. 43.

quiring payment to him, and who must also produce and show to the party the foregoing documents, and the original power of attorney, (*i*) and leave with him a copy of the latter (*k*), and then formal demand of payment or performance must be made by the party so authorized. (*k*) The next step must be, to make an affidavit of the facts and of all these proceedings, and of the arbitrator's signature to his award, and the time when, and especial care must be taken to verify every enlargement of the time to make the award; also of the execution of the power of attorney, when any part of the proceedings were under the same. (*l*) Upon such affidavit, and production of the original award, and of the refusal or neglect to comply with the formal request, counsel may be instructed to move for an attachment for disobedience of the rule of Court, by nonperformance of the award. The rule, when for payment of money, is absolute in the first instance, but otherwise is only *nisi*. The Court will not grant an attachment for non-performance of an award, without *personal service*, where the party has another remedy, as by action (*m*).

How opposed.

Any alleged corruption in the arbitrator, is no answer to a motion for an attachment for nonperformance of an award; (*n*) for in answer to that proceeding to enforce an award, the party resisting can only object to defects apparent on the face of the award, because the making a motion to enforce an award cannot anticipate *extrinsic* objections. (*o*) The proper course therefore is, for the party objecting to an award, on account of *extrinsic* objections, to make a distinct motion to set the same aside upon an affidavit showing his objection, which we have seen, must in general relate to the corrupt or irregular conduct of the arbitrator. (*p*) But when the submission to arbitration was by a deceased party, an award therein cannot in general be enforced by attachment against his personal representative. (*q*) It has been considered that under the terms of the statute 9 & 10 W. 3, when once the submission has been made a rule of one Court, an attachment cannot be moved for in another Court, although one of the causes referred was depending in the latter. (*r*).

2. By action.

In some cases, especially when the proceeding is by attachment, the opponent would be induced immediately to move to set aside the award; the safe course is, therefore, to wait till the

(*i*) See the full practice, Tidd, 9th ed. 836, 7.

(*k*) *Laugher* v. *Laugher*, 1 Cromp. & Jerv. 398.

(*l*) Id. ibid.

(*m*) *Lowe* v. *Johnson*, 4 B. & Ad. 412.

(*n*) At law, *Brazier* v. *Bryant*, 3 Bing. 167; S. P. in bankruptcy, *Dick* v. *Milligan*, 4 Bro. C. C. 117; 2 Ves. J. 23.

(*o*) Ibid.

(*p*) Ibid.

(*q*) Willes, 315.

(*r*) *Wimpenny* v. *Bales*, 2 Cromp. & J. 379; *ante*, 92, note (*w*).

CHAP. III. OF REFERENCES TO ARBITRATION, &c.

time for moving the Court under the statute, has expired, or till after the end of the second term, and then to proceed in an action, because in such action the defendant could not, by plea or otherwise, avail himself of any objection on account of the award having been obtained by corruption or undue means. (r) If the award was to pay or repay a sum of money on *demand*, there should be a preceding demand, and which must also be stated in an affidavit to hold the party to bail. (s) The rest of the practice in enforcing an award, has been so fully and ably stated by Mr. Tidd, in his Practice, and Mr. Watson, in his Treatise on Arbitration, that it is considered to be unnecessary here to repeat the same.

Seventeenthly, Jurisdiction in equity. (t)

Seventeenthly, Although it has been doubted whether Courts of Equity have any jurisdiction under the 9 & 10 W. 3, the first section of which speaks of *Courts of Record;* it seems now to be clearly established, that the act extends to the Court of Chancery, and that an agreement that a submission shall be made a rule of Court, may be given effect to by an order or rule of the *Court of Chancery*, so as to move that Court to enforce the award, or to set it aside; (u) and it seems that that Court in which the submission is first made a rule, acquires the exclusive jurisdiction. (v) But if the submission has merely provided, that the agreement to refer shall be made a rule of a Court of *Law*, then a Court of Equity cannot proceed after such rule has been obtained, (w) unless the Court of Law, as sometimes occurs, will alter the terms of their rule and permit a suit in equity. (x) And where, although a bill had been filed to set aside an award before the submission had been made a rule of the Court of King's Bench; it was held that after such rule had been obtained, equity had no jurisdiction, although by the terms of the submission, it *might* originally have been made a rule of the Court of Chancery; (y) and *e converso*, on the other hand, when by consent an order has been made in Chancery to refer a suit to arbitration, no other Court has jurisdiction over an award made in pursuance thereof; (z) and in general, an

(r) Defendant cannot *plead* corruption or partiality, 8 East, 344; 5 B. & Cres. 534; Gow's Cases Ni. Pri. 5.

(s) *Diver* v. *Hood*, 7 Bar. & Cres. 494.

(t) See in general Chitty's Eq. Dig. tit. Arbitrator.

(u) *In matter of Joseph and Webster*, 1 Russ. & M. 498, note (a); *Dawson* v. *Sadler*, 1 Sim. & Stu. 537; and see 2 Mad. Ch. Pr. 712, 713, *accord;* Tidd, 9th ed. 821, contra.

(v) *Dawson* v. *Sadler*, 1 Sim. & Stu. 537.

(w) *Lord Lonsdale* v. *Littledale*, 2 Ves. J. 451; *Davis* v. *Getty*, 1 Sim. & Stu. 411; *Gurnnett* v. *Bannister*, 14 Ves. 530; 2 Madd. Rep. 6; 2 Jac & W. 249.

(x) *Lonsdale* v. *Littledale*, 2 Ves. 453.

(y) *Davis* v. *Getty*, 1 Sim. & Stu. 411; *Dawson* v. *Sadler*, 1 Sim. & Stu. 537.

(z) *Pitcher* v. *Rigby*, 9 Price, 79.

award in a suit depending in a particular Court, has been considered not within the statute. (*a*) But nevertheless, a general reference to arbitration, made by parties in a suit then depending in Chancery, may be, and frequently is made an order of a Court of Law; (*b*) and in general, by reference to arbitration, both at law and in equity, the Court divests itself of all jurisdiction over the facts. (*c*)

It is settled that references, where the submission is to be made a rule of Court, followed up by such a rule, are entirely governed by the statute 9 & 10 W. 3, and which is as imperative upon Courts of Equity as upon Courts of Law, as to the time within which an application to set aside an award must be made; and the statute has transferred the jurisdiction of a Court of Equity in such a case, even of fraud or concealment in one of the parties, altogether to the Court of which the submission has been made a rule of Court; and the parties having selected their own tribunal, and a certain period only being allowed by the statute, they are wholly bound if they suffer that time to elapse, (*d*) and the statute regulation, as regards time, is as obligatory in equity as at law. (*e*)

Eigthteenthly, Of arbitrations under other particular statutes.

We have in a previous page alluded to some of the statutes *compulsory* on parties to submit to arbitration, or at least affording them a right to *claim a* reference; (*f*) of this nature is the *Friendly Society* Act, (*g*) and the *Saving Bank* Act. (*h*) The acts respecting *masters and servants* in husbandry, or in certain *trades*, either enabling magistrates to hear complaints for nonpayment of wages, (*i*) or enabling such masters or workmen to demand and have a reference. (*k*) The acts relating to *Seamen's Wages,* (*l*) and the *Salvage* Acts, which also afford powers of arbitrating. (*m*) The consideration of all the powers given by these and other particular acts of the same nature, would extend beyond the subject of this general summary. The acts

(*a*) *Lonsdale* v. *Littledale*, 2 Ves. J. 451; 2 Mad. Ch. Pr. 713.

(*b*) *Nichols* v. *Chalie*, 14 Ves. 265.

(*c*) *Dick* v. *Milligan*, 2 Ves. J. 24.

(*d*) *Auriol* v. *Smith*, 1 Turn. & Russ. 124, 5, 6.

(*e*) *Godfrey* v. *Boucher*, 3 Vin. Ab. 139, pl. 38, *contra* to *Allardes* v. *Campbell*, Bunb. 265.

(*f*) *Ante*, 74.

(*g*) 10 G. 4. c. 56, s. 27.

(*h*) 9 G. 4, c. 92, s. 45, *Compulsory*, and no action lies, *Crisp* v. *Bunbury*, 8 Bing. 394.

(*i*) 4 G. 4, c. 34; 10 G. 4, c. 52; Burn J. Servants, xviii; *semble*, an *infant* is not within the 3d section of that act, Hawk. P. Cr. chap. 64, sect. 35.

(*k*) 5 G. 4, c. 96, s. 3, Burn J, tit. Servants, xxi.

(*l*) Abbott on Shipping; Burn J. tit. Seamen, 59 Geo. 3, c. 58; *Ship Minerva*, 1 Hag. Rep. 56.

(*m*) 1 & 2 Geo. 4, c. 75: and see *Jonge* v. *Nicholaas*, 1 Hagg. 201; and see other statutes, Burn J., Wreck; Abbott on Shipping.

are full and explicit; and when they give a *power* to demand an arbitration, the provision is construed to be *imperative*, and to preclude parties from suing in cases within the enactments; for otherwise the spirit of litigation, and the desire to have the matter discussed in a superior tribunal, would render the enactments dead letters. (*n*) But the *Salvage* acts have been expressly holden not to take away the common law *general* right to sue for recompense in those cases. (*o*)

(*n*) *Crisp* v. *Bunbury*, 8 Bing. 394.
(*o*) 3 Bos. & Pul. 612; but in case of salvage on re-capture, recourse can only be had to a Prize Court, 2 Dougl. 594; 33 Geo. 3, c. 66, s. 42.

CHAPTER IV.

SUMMARY PROCEEDINGS BEFORE JUSTICES OF THE PEACE FOR PRIVATE INJURIES AND PENALTIES, AND PRACTICAL DIRECTIONS.

First, THOSE OF A GENERAL NATURE.
1. For assaults and batteries, 9 Geo. 4, c. 31, s. 27 -
2. Stealings of property, 7 & 8 Geo. 4, c. 29, s. 66 -
3. Malicious injuries to property, id. chap. 30, s. 24 -
4. Game Act, 1 & 2 W. 4, c. 32, s. 12, 30 - - -
5. Construction of these Acts
6. Similarity in the enactments - - - -

Secondly, PRACTICAL PROCEEDINGS TO ENFORCE COMPENSATIONS OR PENALTIES.
1. Within what time must prosecute - - - - -
2. Who must or may prosecute - - - -
3. Against whom - - -
4. Before what justice or justices - - - - -
5. The information or complaint - - - -
6. The summons - - -
7. The service thereof - -
8. The search warrant - -
9. The warrant to bring offenders before justice, and apprehension thereon - -
10. The evidence and witnesses, and process to compel attendance - - - -
11. The hearing before the justices - - - - -
12. Of adjournments - -
13. The conviction and costs -
14. Of special cases -
15. Of appeals and recognizances thereon - - - -
16. Of certiorari, and proceedings thereon - - -
17. Proceedings in execution -
18. Proceedings for restitution
19. Liabililty of complainant -
20. Liability of, and protection to justices - - -

Thirdly, IN CASES OF FORCIBLE ENTRY AND DETAINER.

Fourthly, IN OTHER CASES.
1. As beween landlord and tenant - - - -
   1. Rent in arrear, no distress
   2. Fraudulent removal -
   3. Premises deserted -
   4. Paupers' cottages, &c. -
II. Penalties in general -

CHAP. IV. SUMMARY PROCEEDINGS, &c.

The subjects of this Chapter are the Practical Summary Proceedings for Private Injuries, and Penalties.

WE are in this Chapter to examine *the practical proceedings, to obtain a summary conviction and compensation or punishment, before one or more Justices of the Peace, for small Private Injuries,* whether to the *Person* or *Personal* or *Real Property;* and it will be found that the rules here collected, will also in general apply to the practical proceedings to be observed in the recovery before a Justice, of pecuniary penalties, under the very numerous *Penal Statutes,* which impose them as measures of police.

Summary proceedings, when expedient.

We are to suppose that an injury has been committed, and that the case is either unfit for arbitration, or that any measure of that nature has failed, and that on account of the smallness

CHAP. IV. SUMMARY PROCEEDINGS, &c.

of the injury, or of the poverty or station of the complainant, or wrong-doer, it is desirable to avoid formal expensive litigation, and to seek redress by economical and expeditious *summary remedy*. We have seen the risk attending proceedings by *action* in the Superior Courts, for small injuries, in respect of *costs*, especially for assaults, slanders, and small transient trespasses to land or other property; and that unless there be a permanent and valuable right to be tried, and the opponent is certainly able to pay costs, it is most prudent to forbear to proceed at all; or at least most advisable to adopt some *summary proceeding*, and that perhaps rather with a view to *prevent repetition* of the injury, than to recover actual or supposed compensation. The Legislature has considered that it is better to provide *some* summary, speedy and cheap compensation or punishment, than by denying redress, or rendering it so expensive as to be beyond the means of adoption, to induce men to revenge themselves; (*a*), and therefore, especially of late, has introduced several very useful enactments, extending to almost every description of small private injury, and forming a *new class of jurisdiction delegated to Justices*, and of which we will now take a concise practical view.

Original limitted jurisdiction of Justices of the Peace out of Sessions.

Anciently the functions and jurisdiction of one or more Justices of the Peace, when not assembled at general or quarter sessions, were almost entirely *ministerial*, viz., to *preserve* and *prevent breaches of the peace*, and to cause malefactors to be *apprehended*, and their appearance secured, to take their trial for alleged offences before a higher tribunal, either at the assizes or sessions; and the principal exceptions were *Forcible Entries and Detainers;* with respect to which, we shall find that by ancient statutes, one or two justices, though not at Quarter Sessions, had summary judicial powers. In more modern times the increase of population, and still more the increase of legislation, has rendered it essential to delegate jurisdiction over small matters of police to Justices; and in numerous cases, whether for prevention or punishment of breaches of some police regulations, small offenders were subjected to *pecuniary penalties*, and to imprisonment for a short time if they did not pay them; frequently *one* Justice, and in cases of more importance, *two* Justices had power to decide summarily, subject sometimes to an appeal to sessions, but very frequently final without any appeal, and even without the power of the superior Court of King's

(*a*) See the observations of Treby, Ch. J. cited by Parker, C. J. *Harrison* v. *Thornborough*, Gilb. Cas. L. & E. 117; and *ante*, 1 Vol. 23, note (*d*).

Bench, to review their formal proceedings upon certiorari. A most familiar instance was the proceedings under the now repealed act, 5 Ann, c. 14, for a 5*l.* penalty for killing game without being qualified, where one justice could convict, and there was no appeal, though the writ of certiorari was not taken away.

Jurisdiction extended to cases of contract.

The small expense incident to this and similar proceedings, before one or more Justices, in still more recent times, at length induced the Legislature to extend this summary jurisdiction, even to cases apparently *wholly foreign* to the object of the *original* institution of Justices of the Peace; viz., enabling them to decide upon questions *of contract* between *masters and servants*, when the latter were *labourers* working for wages, or servants in certain trades. (*b*)

Extended to small private injuries to persons or property.

The next step was to afford compensation, by the decision of a Justice, for *verbal abuse*, by stage-coachmen to passengers. (*c*) But there were no regulations affording *general compensation or punishment for small private injuries*, until the three principal statutes were recently passed, viz., the 7 & 8 Geo. 4, c. 29, relative to small *illegal takings* of property, whether strictly personal or in part connected with the freehold, not exceeding 5*l.* in value; the 7 & 8 Geo. 4, c. 30, relative to small *wilful or malicious injuries* to personal or real property, whether private or public, not exceeding 5*l.*; and the 9 Geo. 4, c. 31, relative to *common assaults and batteries*, not causing injury exceeding 5*l.* The former two acts enabling *one Justice* summarily to hear and determine the complaint of the party aggrieved, and award him compensation to the extent of 5*l.* unless when he has given evidence, and then to be paid in aid of the county rate; and the latter act requiring *two* Justices to hear and determine, and convict in not exceeding 5*l.*, to be paid in aid of the county rate.

The object of the recent enactments.

These statutes were enacted with a view to prevent expensive actions in the superior Courts for trifling assaults and trespasses, which could not be proceeded for in the County Court even by *justicies*, that Court not having jurisdiction over trespasses *vi et armis*; (*d*) and it is perhaps to be regretted that general cases of *slander* have not also been provided for. (*e*) If these statutes be judiciously acted upon, they will render it unnecessary to resort to expensive actions in the superior Courts, when the value of the matter in dispute cannot justify these measures; and as regards

(*b*) 4 Geo. 4, c. 34; 10 Geo. 4, c. 52; 5 Geo. 4, c. 96; Burn's Jus. tit. Servants.

(*c*) 2 & 3 W. 4. c. 120, s. 47, 99.

(*d*) *Ante*, 1 Vol. 23, 24.

(*e*) Id. ibid.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

the proceedings before two Justices for common assaults and batteries, they have rendered unnecessary indictments at the sessions or assizes, unless in cases of assaults with intent to commit a felony, or of an aggravated nature. (*f*) But still it must be observed that the limited penalty of 5*l.* is to be paid only in aid of the *county rate;* so that the proceeding before two Justices for an assault and battery can in strictness only be for *punishment*, and not directly for private compensation, for the act does not give the two Justices any direct authority to award compensation, although in case of injuries to personal or real property, one Justice, it will be observed, has that power. It should seem, however, that independently of these statutes, the party charged might at any time before conviction, or at least before the hearing, legally compromise with the party aggrieved, and thereby avoid payment of any fine or penalty; and thus the proceeding might operate in all cases as a private satisfaction.

Former and present rules of constructions, as regards summary proceedings.

As in all or most of the cases where a penalty or fine is to be paid, the party is subject to *imprisonment* in default of payment, an absurd rule of construction for some time prevailed, as regarded all these summary proceedings, viz. that the proceeding leading to imprisonment without a previous trial by jury was an unconstitutional proceeding, and contrary to Magna Charta; (*g*) and that therefore a tight hand ought to be held over these summary convictions, and more strictness required in the forms of proceedings and the jurisdiction, and a due exercise of it manifestly appear, and that no intendment in favour of them should be admitted; and that the superior Courts ought to be astute in discovering defects in convictions before summary jurisdictions; and it was even supposed that a different and more rigid rule of averment and evidence in support of summary proceedings should be required than in an action. (*h*) But these absurdities, the indulgence of which might induce a suspicion that the superior Courts were formerly *jealous* of those inferior jurisdictions, have for some time been abandoned; and now the doctrine is that whether it was expedient that those jurisdictions should have been erected, was a matter for the consideration of the *Legislature;* but that as long as they exist, the Courts ought to go

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(*f*) See exceptions, 9 Geo. 4, c. 31, s. 29; *Anon.* 1 B. & Adolph. 382.

(*g*) See Lord Holt's observations in Queen v. *Wheller*, and notes, 2 Lord Raym. 842; and *Rex* v. *Chandler*, 2 Salk. 378; and 9 Hen. 3. c. 29; and the notes in Chitty's Col. Stat. 340; but note, the words of that act are, that no man shall be imprisoned, &c. "but by "lawful judgment of his peers, *or by* "*the law of the land;*" consequently an imprisonment by virtue of any legislative enactment, is by the law of the land.

(*h*) Id. ibid.; and see *Rex* v. *Thompson*, 2 T. R. 18; *Rex* v. *Swallow*, 8 T. R. 284; *Rex* v. *Stone*, 1 East, 639; *Rex* v. *Turner*, 5 Maule & S. 206.

all reasonable lengths to support the decisions of Justices, especially as in whatever light they were formerly seen, the country are now convinced that in general they derive considerable advantage from the exercise of the powers delegated to justices, and therefore in modern times they have received proper support from the Courts of Law; (*i*) and for the same reason the Courts hold, that although in drawing up convictions magistrates cannot set all forms at nought; yet on the other hand they ought not to be entangled in greater forms or ceremonies than the superior Courts; (*j*) and in one of the latest decisions upon the subject it was established that the same, and not a stricter rule of *evidence* is to be observed before justices, as in the superior Courts; (*k*) and in a very recent case it appears that when a conviction on the face of it assumes facts so as to bring the case within the jurisdiction of the justice, the Court will not, on a motion for a *certiorari*, and which is taken away by the act, give effect to affidavits denying the facts and showing that the justices ought not to have convicted; because the Legislature, by giving the magistrates power to decide, concluded that they would decide to the best of their discretion. (*l*) But although a conviction falsely assuming facts may in itself be sustainable and enforceable as well directly as collaterally, so as to subject the party convicted to the payment of the penalty, and preclude him from sustaining any action against the magistrate or other person acting under it; (*m*) yet if a magistrate were *wilfully and criminally* to mistake or assume facts in order to give himself jurisdiction and convict, he might, by *mandamus*, in certain cases where the statute requires that the conviction shall state the evidence, be compelled to reform his conviction by setting forth the evidence according to the facts, (*n*) or he would be liable to indictment or criminal information, or at least would be subjected to the animadversion of the Court and the payment of costs of the motion against him, (*o*) and would probably be justly removed from his office.

General precautions to be observed, in adopting summary proceedings before Justices.

It is to be regretted, that considering the very numerous enactments for the recovery of penalties before justices, and the extensive operation of the recent enactments, affording compen-

(*i*) Per Ashhurst, J. in *Rex* v. *Thompson*, 2 T. R. 18.

(*j*) Per Lord Kenyon, in *Rex* v. *Swallow*, 8 T. R. 284.

(*k*) *Rex* v. *Turner*, 5 Maule & Selw. 206.

(*l*) *Anonymous*, 1 B. & Adolph. 382.

(*m*) Id. ibid. and *Brittain* v. *Kinnaird*, 1 Brod. & B. 432; and *Gray* v. *Cookson*, 16 East, 13.

(*n*) *In re Rex*, 4 Dowl. & R. 352; *Ex parte Marsh*, id.

(*o*) *Rex* v. *Barker*, 1 East Rep. 186; see a gross case of neglect of duty, *Rex* v. *Constable*, 7 Dowl. & R. 663.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

sation or punishment for private injuries, there is not (excepting in the act enabling *one* justice to receive an information, and issue his summons, and giving a general form of conviction,) (*p*) *any general comprehensive enactment regulating such proceedings;* as the information, summons, service thereof, process against witnesses, hearing before the justices, and other proceedings, establishing one general uniform set of rules to be observed in all cases, with appropriate variations when necessary. From the want of these it will be found that the proceedings are frequently very different. Sometimes the *information* or complaint, we shall find, must be on oath; in other cases, it suffices if it be in writing; and in others perhaps might be verbal. Sometimes also the *summons* must be actually *served on* the party accused himself; at others, may be left at his *abode*, and in others may be served on any *inmate;* and the other proceedings also vary. So that this general caution must be observed, that in each case the particular statutes applicable to the case must be carefully read and their provisions pursued; and if of doubtful import, then in prudence an excess of care should be adopted. And although the magistrate himself might be disposed to take upon himself the direction of all the proceedings, yet every prudent individual should be prepared to lay before the magistrate the best forms to be adopted in all stages of the proceeding, and with that view the following directions are given. We will first consider the terms of the principal recent enactments of a general nature or of most practical importance, and then state the practical proceedings in regular order.

First, Summary proceedings for a common assault or battery, on 9 Geo. 4. c. 31. s. 27.

First, *Common Assaults and Batteries.*—The 9 Geo. 4, c. 31, s. 27, after reciting that it was expedient that a summary power of *punishing* persons for *common assaults and batteries* should be provided under the limitations thereinafter mentioned, enacts "that where any person shall unlawfully assault or beat any "other person, it shall be lawful for *two justices* of the peace, "*upon complaint of the party aggrieved*, to hear and deter-"mine such offence; and the offender, upon conviction thereof "before them, shall forfeit and pay such fine as it shall appear "to them to be meet, not exceeding, together with costs (if "ordered), the sum of five pounds, which fine shall be paid "to some one of the overseers of the poor, or to some other "officer of the parish, township or place in which the offence

(*p*) 3 G. 4, c. 23, s. 1, 2 & 3.

"shall have been committed, to be by such overseer or officer "paid over to the use of the general rate of the county, riding, "or division in which such parish, township or place shall be "situate, whether the same shall or shall not contribute to such "general rate; and that the evidence of any inhabitant of the "county, riding or division shall be admitted in proof of the "offence, notwithstanding such application of the fine incurred "thereby; and if such fine as shall be awarded by the said "justices, together with the costs (if ordered), shall not be paid "either immediately after the conviction or within such period "as the said justices shall at the time of the conviction appoint, "it shall be lawful for them to commit the offender to the com-"mon gaol or house of correction, there to be imprisoned for "any term not exceeding two calendar months, unless such fine "and costs be sooner paid; but that if the justices, upon the "hearing of any such cause of assault or battery, shall deem "the offence not to be proved, or shall find the assault or bat-"tery to have been justified, or so trifling as not to merit any "punishment, and shall accordingly dismiss the complaint, they "shall forthwith make out *a certificate* under their hands, "stating the fact of such dismissal, and shall deliver such certi-"ficate to the party against whom the complaint was preferred."

The 28th section then enacts, that "if any person against "whom any such complaint shall have been preferred for any "common assault or battery, shall have obtained such certificate, "or having been convicted shall have paid the amount adjudged "to be paid, or shall have suffered imprisonment for non-pay-"ment thereof, he shall be released from all further proceedings "for the same cause." The section 29 provides and enacts that these provisions are not to apply to cases of assault or battery which the justices shall find have been accompanied by *any attempt to commit felony*, (q) or which they shall be of opinion is a fit case to be the subject of indictment, and that they shall then abstain from convicting, and shall deal with the case in the same manner as they would have done before the passing of the act, viz. direct a prosecution at the sessions. And the same section also provides that justices of the peace are not to hear and determine any case of assault or battery in which any question shall arise as to the *title* to any lands, tenements or heredi-taments, or any interest therein or arising therefrom, or to any

(q) See *Anonymous*, 1 B. & Adolph. 382. This section obviously, by the terms "which the justices shall find, &c." gives them unlimited discretion to proceed or not in such cases.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

bankruptcy, insolvency or execution under the process of any Court of Justice.

The 33d section enacts that where any person shall be charged on the oath of a credible witness, before *any justice* of the peace, (*s*) with any such offence, the justice may summon the person charged to appear before any two justices of the peace, at a time and place to be named in such summons, and if he do not appear, then, upon proof of the due service of summons upon such person *by delivering the same to him*, the justices may either proceed to hear and determine the case *ex parte*, or may issue their *warrant for apprehending* such person and bringing him before them, or the justice before whom the charge shall be made may (if he shall so think fit) issue such *warrant* in the first instance, without any previous summons.

The 34th section enacts that prosecutions under the act punishable on summary conviction shall be commenced within *three calendar months* after the commission of the offence. The 35th section enacts that the justices *may* cause the conviction to be drawn up in the subscribed or *in any other form* of words to the same effect. (*t*)

The 36th section enacts that no conviction shall be quashed for want of form, (*u*) or be removed by *certiorari, or otherwise*, (*v*) into any of his Majesty's superior Courts of Record; and that no warrant of commitment shall be held void by reason of any defect therein, provided it alleges that the party has been *convicted*, and there be a valid conviction to sustain the same. (*w*)

(*s*) This provision enabling one justice to receive the information, and issue his summons, is a repetition of the general enactment in 3 Geo. 4, c. 23, s. 2.

Prescribed form of conviction in 9 Geo. 4. c. 91.

(*t*) Be it remembered, that on the —— day of ——, in the year of our Lord ——, at ——, in the county of [*or* riding, division, liberty, city, *&c. as the case may be*] *A. O.* is convicted before us [*naming the justices*], two of His Majesty's justices of the peace for the said county, [*or* riding, *&c.*] for that he the said *A. O.* did [*specify the offence, and the time and place when and where the same was committed, as the case may be*], and we the said justices adjudge the said *A. O.*, for his said offence, to be imprisoned in the ——, and there kept to hard labour for the space of ——, [*or* we adjudge the said *A. O.*, for his said offence to forfeit and pay the sum of] [*here state the amount of the fine imposed*], and also to pay the sum of —— for costs; and in default of immediate payment of the said sums, to be imprisoned in the ——, for the space of ——, unless the said sums shall be sooner paid [*or* we order that the said sums shall be paid by the said *A. O.* on or before the —— day of ——]; and we direct that the said sum of —— [*viz. the amount of the fine*] shall be paid to ——, of —— aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; and we order that the sum of ——, for costs shall be paid to *C. D.* [*the party aggrieved*]. Given under our hands the day and year first above mentioned.

(*u*) This is a repetition of the general enactment in 3 G. 4, c. 23, s. 3.

(*v*) In general all summary proceedings are removable by *certiorari*, unless expressly taken away; see *post*, and 1 Stra. 67; 6 East, 514; *Rex* v. *Cashiobury*, 3 Dowl. and R. Mag. Cases, 485; *Rex* v. *Hanson*, 4 B. and Ald. 521.

(*w*) This enactment was to avoid the effect of the decision in *Wicks* v. *Clutterbuck*, 2 Bing. 483.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

It will be observed that this act 9 Geo. 4, c. 31, as respects summary proceedings by conviction for common assaults and batteries before *two* justices, does not require a complaint on oath, or even in writing, but there must be an oath before issuing any summons or warrant; and it contains no clause authorizing an *appeal*, and consequently, according to the general rule, there can be no appeal; (*x*) and as the writ of *certiorari* is expressly taken away, the decision of *two* justices in these cases is final.

Secondly, Proceedings for taking personal property, trees, fences, &c., not felony or misdemeanor on 7 & 8 G. 4, c. 29.

As respects the *illegal taking* of personal property, or things annexed to the realty, when not indictable, almost every possible injury in the nature of an *illegal taking*, is remediable or punishable before one or more justices, under the 7 & 8 Geo. 4, c. 29.

The 7 & 8 Geo. 4, c. 29, s. 30, enacts, that the *unlawfully and wilfully* taking or killing any *hare or cony* in the *day-time*, in any *warren or ground, lawfully used* for breeding or keeping of hares or conies, whether inclosed or not, shall subject the offender to the payment of not exceeding 5*l*., on conviction before *one* justice. (*y*)

The *stealing* any *dog or beast or bird, ordinarily kept in a state of confinement*, (*z*) and not the subject of larceny at common law, subjects the offender to not exceeding 20*l*. for the first offence, on conviction before *one* justice, and imprisonment for twelve calendar months with hard labour; and for the second offence, on conviction before *two* justices, the like punishment, and if a male offender, also whipping. (*a*)

The unlawfully and wilfully killing, wounding, or taking any *house dove or pigeon*, under such circumstances as shall not amount to larceny at common law, subjects the offender on conviction before *one* justice, to forfeiture of the value of the bird, and not exceeding 2*l*. (*b*)

The provisions relative to the taking of fish, are somewhat complex, depending on the exact description of the place and water where the same were taken. The unlawfully and wilfully taking or destroying, or attempting to take or destroy, any *fish* in any water, (not being water running through, or being in any land adjoining, or *belonging to the dwelling-house of any*

(*x*) *Rex* v. *Hanson*, 4 B. and Ald. 521; 1 Maule and Selw. 448; 1 Stra. 67; 6 East, 514, Com. Dig. Justices Peace, c. 3; Dougl. 549.

(*y*) 7 & 8 G. 4. c. 29, s. 30, as to game in general; see 1 and 2 W. 4, c. 32, *post*, 142.

(*z*) This act extends to the stealing a ferret or other animal usually confined, although not indictable; *Rex* v. *Searing*, Russ. & R. C. C. 350; *ante*, 1 Vol. 88.

(*a*) Id. sect. 31; and see [illegible]tiskins, &c. id. sect. 32.

(*b*) Id. sect. 33.

person, (*c*) being the owner of such water, or having a right of fishery therein,) (*d*) but which shall be private property, or in which there is a private right of fishery, subjects the offender on conviction before *one* justice, to pay the value of the fish taken or destroyed, not exceeding 5*l.* (*e*) *Angling* in the day-time is excepted from that regulation; but an offender by angling in the day-time in the *excepted* water, is liable on conviction before *one* justice, to pay not exceeding 5*l.*; and if the angling has been in water not above excepted, then such *offending* angler is subject on conviction before one justice, to not exceeding 2*l.* penalty. (*f*) But then it is provided, that if the tackle of the fisher has been seized under the authority given by the act, he shall not be liable to pay any damages or penalty. (*g*)

The act then contains numerous penalties against *stealing trees, shrubs, alive* and *dead fences, stiles, gates, fruit, vegetables,* and *other things,* recoverable as therein directed, before one or two justices. (*h*)

Receivers of property, and *abettors,* where the original offence is punishable on summary conviction, are subjected to similar penalties, also recoverable before *one* justice. (*i*) The act then gives a power of *apprehending* all such offenders *found committing* any prohibited offence without warrant; (*k*) and authorizes a justice, upon *oath* of a credible witness of a *reasonable cause,* to suspect that a party has in his possession or on his premises any property whatsoever, on or with respect to which any such offence shall have been committed, to grant his warrant to *search* for such property as in the case of *stolen goods.* (*l*) The act then limits prosecutions for summary conviction, to *three calendar months* after the commission of the offence, and renders admissible the *evidence* of the party aggrieved, and of any *inhabitant* of the county; (*m*) although when the testimony of the former has been received on his own behalf, the statute takes away one temptation to perjury, by applying the whole sum awarded in aid of the county rate. (*n*)

The 65th section then directs the course of proceeding for

(*c*) This expression has been objected to as uncertain; see *ante,* 1 Vol. 178, 9, 192, 3, where see some constructions.

(*d*) When in such excepted water, the offence is an *indictable misdemeanor.*

(*e*) Id. sect. 34, 35.

(*f*) Id. ibid. *ante,* 192, 3.

(*g*) Id. sect. 35.

(*h*) Id. sect. 38 to 58, stated *ante* 1 Vol. 93, 94, 407 to 412, and cases there noticed. A young fruit tree is not a vegetable production within the meaning of the act, when growing in a garden, &c. *Rex* v. *Hodges,* 1 Mood. and M. 341; *ante,* 1 Vol. 93, 4.

(*i*) Id. sect. 60, 62.

(*k*) Id. sect. 63; and *ante,* 1 Vol. 617 to 633, as to the construction of the words "*found committing,*" &c.

(*l*) Id. sect. 63. The cases, therefore, as to *search warrants,* will be applicable; see, in general, Burn J. 26th edit., tit. Search Warrant.

(*m*) Id. sect. 65.

(*n*) Sect. 66.

the penalty, viz., that where any person shall be charged on *the oath* of a credible witness, before a justice, with any such offence, the justice may *summon* him, and if he shall not appear accordingly, then (upon proof of the due *service* of the summons upon such person, by delivering the same to him *personally, or by leaving the same at his usual place of abode.* (o) The justice may proceed to hear and determine the case *ex parte,* or issue his *warrant for apprehending such person,* and bringing him before himself or some other justice; or the justice before whom the charge shall be made, may, (if he shall so think fit), without any previous summons, (unless when otherwise specially directed) issue such warrant; and the justice before whom the person charged shall appear or be brought, shall proceed to hear and determine the case. (p) It should seem, therefore, that to ground a summary proceeding for a penalty under this act, there must be an *information* of the offence *on oath.* Whereas the 9 Geo. 4, c. 31, s. 27, only requires the complaint of the party aggrieved, without directing that the complaint shall be on *oath,* or even in terms requiring it to be in writing, although then also there must be an oath before the summons. (q)

The act then directs, that the sum forfeited for the value of the property stolen or taken, or amount of injury done, shall be assessed by the convicting justice, and shall be paid *to the party aggrieved,* if known, except where such party shall have been examined in proof of the offence; and in that case, or where the party aggrieved is unknown, then such sum shall be applied in the same manner as a penalty, and then shall be paid to one of the overseers of the poor, or other officer of the parish where the offence was committed, to be by him paid over to the use of the county rate; and provides, that where several persons join in the commission of the same offence, and on conviction, shall each have been adjudged to forfeit a sum equivalent to the value of the property or the amount of the injury—in such case no further sum shall be paid to the party aggrieved, than the sum forfeited by one of such offenders only, and the corresponding sum forfeited by the other offenders, shall be applied as thereinbefore directed. (r) The 67th section enacts, that where the person summarily convicted, shall not pay the sum ordered to be paid, the justice may commit him to the common gaol or house of correction, to be impri-

(o) See the difference between the prescribed mode of service in this and in the 9 Geo. 4, c. 31, s. 33; *ante,* 134.

(p) Id. sect. 65.

(q) *Ante* 132, 3.

(r) Sect. 66.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

soned and kept to hard labour, according to the discretion of such justice, for not exceeding two calendar months, where the sum does not exceed 5*l.*, and prescribes the further scale of imprisonment; but the imprisonment is to determine on payment of the sum awarded and costs. (*s*)

The section 68 enacts, that the justice may in certain cases, even after the conviction, discharge the offender upon his *making such satisfaction* to the party grieved for damages and costs, or either, as the justice shall ascertain and fix; (*t*) and by section 69, the King may pardon any person imprisoned under that act; and the 70th section enacts, that when any person summarily convicted under this act shall have paid the penalty, or shall have received a remission thereof from the crown, or suffered imprisonment for nonpayment thereof, he shall be relieved from all further proceedings for the same cause. (*u*) The 71st section allows the form of conviction as in the note (*v*).

The 72d section enacts, that in all cases where the sum adjudged to be paid on summary conviction, shall exceed 5*l.*, or the imprisonment shall exceed one calendar month, or the conviction shall take place before *one* Justice only; any person who shall think himself aggrieved by such conviction, may appeal to the next Court of General or Quarter Sessions, which shall be holden not less than *ten days* after the day of such conviction, provided he shall give to the complainant a *notice in writing of such appeal*, and of the cause and matter thereof,

(*s*) Id. sect. 67.

(*t*) Id. 68.

(*u*) Id. sect. 70.

Prescribed form of conviction in 7 & 8 Geo. 4. c. 29.

(*v*) Be it remembered, that on the —— day of ——, in the year of our Lord ——, at ——, in the county of ——, [*or* riding division, liberty, city, &c., *as the case may be*], *A. O.* is convicted before me, *J. P.*, one of His Majesty's Justices of the Peace for the said county [*or* riding, &c.], for that he the said *A. O.* did [*specify the offence, and the time and place when and where the same was committed, as the case may be, and on a second conviction state the first conviction*]; and I the said *J. P.* adjudge the said *A. O.* for his said offence, to be imprisoned in the ——, [*or* to be imprisoned in the ——, and there kept to hard labour] for the space of [*or* I adjudge the said *A. O.* for his said offence, to forfeit and pay £. [*here state the penalty actually imposed, or state the penalty, and also the value of the articles stolen, or the amount of the injury done, as the case may be*], and also to pay the sum of —— for costs; and in default of immediate payment of the said sums, to be imprisoned in the —— [*or* to be imprisoned in the ——, and there kept to hard labour], for the space of ——, unless the said sums shall be sooner paid; [*or*, and I order that the said sums shall be paid by the said *A. O.* on or before the —— day of ——], and I direct that the said sum of —— [*i. e.* the penalty only] shall be paid to —— of ——, aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided, [*or* that the said sum of —— *i. e.* the penalty,] shall be paid to, &c., as before]; and that the said sum of —— [*i. e. the value of the articles stolen, or the amount of the injury done*] shall be paid to *C. D.* [*the party aggrieved, unless he is unknown, or has been examined in proof of the offence, in which case state that fact, and dispose of the whole like the penalty, as before*]; and I order that the said sum of —— for costs, shall be paid to ——, [the complainant]. Given under my hand and seal, the day and year first above mentioned.

within three days after such conviction, and seven clear days at the least before such sessions; such person to remain in custody until the sessions, or *enter into a recognizance with two sureties*, to appear at the said sessions to try such appeal, and abide the judgment of the Court thereupon, and pay such costs as shall be awarded: and, on such notice being given, and recognizance entered into, the committing justice is to liberate such person if in custody; and the Court at such sessions shall hear and determine such appeal, and make such order as they shall think meet, and issue process for enforcing such judgment (*w*)

The 73d section enacts, that no conviction shall be quashed for want of form, or removed by *certiorari;* and no *warrant of* commitment held void by reason of any defect therein, provided it be therein alleged that the party has been *convicted*, and there be a valid conviction to support the same (*x*) Section 74 directs, that all convictions shall be returned to the Quarter Sessions, and how far they shall be evidence in future cases. (*y*) Section 75, for the protection of persons acting in the execution of this act enacts, that all actions and prosecutions against any person acting under that act shall be laid and tried in the county where the fact was committed, and commenced within six calendar months, and directs that *notice in writing* of such action, and of the cause thereof, shall be given one calendar month, at least, before the commencement thereof: and in such action, defendant may plead the general issue, and give the special matter in evidence; and no plaintiff shall recover in such action if tender of sufficient amends shall have been made before action brought, or if a sufficient sum of money be paid into Court after such action brought; and then regulates the payment of costs. (*z*)

Thirdly, Proceedings for small *wilful or malicious* injuries to personal or real property, on 7 & 8 Geo. 4. c. 30. s. 24.

The principal statute against *small malicious injuries* to any real or personal property, is 7 & 8 Geo. 4, c. 30. (*a*) The 24th section is very comprehensive, and enacts, "that if any persons shall "*wilfully or maliciously* commit *any damage, injury, or spoil*, "to or upon any real or personal property whatsoever, whether "of a *public* or *private nature*, for which no remedy or punish-

(*w*) Id. sect. 72.
(*x*) Id. sect. 73; see a similar enactment, and reason, *ante*, 134; and *Weeks* v. *Clutterbuck*, 2 Bing. 483.
(*y*) Id. sect. 74.
(*z*) Id. sect. 75.

(*a*) See the enactment, and others of the same nature, and decisions thereon, *ante*, Part 1, page 136 to 137, 138, 9, as to Personalty; and id. page 407, as to Realty.

CHAP. IV.
SUMMARY PROCEEDINGS, &c.

"ment is hereinbefore provided; (*b*) every such person being "convicted thereof, before *one Justice of the Peace*, shall forfeit "and pay such sum of money as shall appear to the justice to "be *reasonable compensation for* the damage, injury, or spoil, "so committed, not exceeding the sum of five pounds; (*c*) "which sum of money shall, in the case of *private property*, be "paid to the party aggrieved, (except where such party shall "have been examined in proof of the offence, (*d*) and in such "case, or in the case of property of a public nature, or wherein "any public right is concerned, the money shall be applied in "such manner as every penalty imposed by a Justice of the "Peace under that act, is thereinafter directed to be applied. "And if such sum of money, together with costs (if so ordered), "shall not be paid, either immediately after the conviction, or "within such period as the justice shall, at the time of the con- "viction appoint; the justice may *commit the offender* to the "common gaol or house of correction, there to be imprisoned "only, or imprisoned and kept to hard labour, as the justice "shall think fit, for any term not exceeding two calendar "months, unless such sum and costs be sooner paid. Pro- "vided always, that nothing herein contained shall extend to "any case where the party trespassing acted under *a fair and* "*reasonable supposition that he had a right to do the act com-* "*plained of*, (*e*) nor to any trespass *not* being wilful or "malicious, committed in *hunting, fishing*, or in *the pursuit of* "*game*; but that every such trespass shall be punishable in "the same manner as before the passing of this act." (*f*)

The 25th section enacts, that *malice* against the owner shall not be essential to be proved to establish an offence under that act. Section 28 enacts, that persons *found committing offences*

(*b*) We have considered this enactment and the decisions thereon, *ante*, 1 Vol. 407 to 410. There must have been some sensible real damage, and not a mere trespass in law; and therefore the mere fact of repeatedly trespassing, by walking over a party's land without breaking fences, &c. would not, it seems, be within this act; *Butler* v. *Turley*, 2 Car. & P. 585; *Dewey* v. *White*, Mood. & Mal. C. N. P. 56; and *Rex* v. *Turner*, R. & M. C. C. 259; and the injury must be charged, and proved as charged; and therefore a charge of maliciously *cutting* a fence, will not sustain a conviction of *carrying* away a fence previously severed by another person; *Rex* v. *Harpur*, 1 Dowl. and Ry. 223; and the magistrate must really assess the damages accruing according to the evidence; id. ibid.

(*c*) See conclusion of the last note.

(*d*) This provision, as observed, *ante*, 136, removes all pecuniary motive for perjury.

(*e*) This was to provide for *bonâ fide* claims of right; see *Kennersley* v. *Orpe*, Dougl. 517; but it must be some fair and plausible colour of title; *Hunt* v. *Andrews*, 3 Bar. & Ald. 341; *Calcraft* v. *Gibbs*, 5 T. R. 19; *Grant* v. *Hatton*, 1 Bar. & Ald. 134; 1 Burn's J., tit. Conviction, 26th ed. 832, 833.

(*f*) And see the Game Act, 1 & 2 W. 4, c. 32, *post*, 142.

under the act (*g*) may be apprehended without a warrant by any peace officer or owner of the property injured, or his servant, or person authorised by him. By sect. 29, prosecutions for offences punishable on summary conviction are to be commenced within three calendar months; and the party aggrieved may be a competent witness. Sect. 30 requires a charge upon the *oath* of a credible witness, and then authorizes the justice to summon the party charged to appear at a time and place to be named in such summons; and requires service of such summons in the same term as in the 7 & 8 Geo. 4, c. 29. s. 65, and authorizes a warrant also as therein mentioned. (*h*) Sect. 31 enacts, that abettors in offences punishable on summary conviction, shall be liable to the same forfeiture and punishment to which the principals are liable. The 32d sect. enacts, that any money forfeited for any injury shall be paid to the party aggrieved, excepting when he has been a witness: and then, or in case he be unknown, the same and every sum to be imposed as a penalty, is to be paid to the overseers of the poor, or other officer, as directed by the justice, and to the use of the general county rate. (*i*) The 33d section provides, that if the damage or penalty be not paid, the offender is to be imprisoned, with or without hard labor, for a term not exceeding two calendar months, where the sum and costs to be paid do not exceed 5*l*., or four months if above that sum, and not more than 10*l*, or not exceeding six months, in any other case determinable on payment. (*k*) Section 34 enables a justice, after a first conviction, to discharge the offender upon his making such satisfaction to the party aggrieved, for damages and costs, or either, as shall be ascertained by the justice. (*l*) And section 35 enables the King to pardon the party imprisoned. The 36th section enacts, that in case any person convicted of any offence, punishable upon summary conviction, shall have paid the sum adjudged, together with costs, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for non-payment, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction in the manner aforesaid; in every such case he shall be released from all further or other proceedings for the same cause. (*m*) Section 37 prescribes the

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(*g*) As to the import of those words; see 1 Vol. 617 to 630; and in particular *Hanway v. Boultbee*, 2 Mood. & M. 15; 4 Car. & P. 350, S. C., and the observations of Tindal, C. J. id; and *ante*, 1 Vol. 625, 6.

(*h*) *Ante*, 137.

(*i*) Id. sect. 32.

(*k*) Id. sect. 33.

(*l*) Id. sect. 34.

(*m*) Id. sect. 36.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

The prescribed form of conviction in 7 & 8 Geo. 4. c. 30, same in substance as *ante* 138, note (*u*).

form of conviction, and which is precisely the same as in the form prescribed in chap. 29, omitting the words in italics. (*n*) The 38th section provides, that in all cases where the sum adjudged to be paid shall exceed 5*l*., or the imprisonment shall exceed one month, or the conviction shall take place before *one* justice only, any person who shall think himself aggrieved by such conviction, may appeal to the next Court of General or Quarter Sessions, provided he shall give to the complainant a notice in writing of such appeal, and of the matter thereof, within three days after such conviction, and seven clear days at the least, before such sessions; such person to remain in custody until the sessions, or enter into recognizances to appear and prosecute such appeal, and abide the judgment of the Court. (*o*) Section 39 enacts, that no conviction shall be quashed for want of form, or removed by *certiorari*, and no warrant of commitment held void by reason of any defect therein, provided it be therein alleged that the party had been convicted, and there was a valid conviction to support the same. (*p*) The 40th section directs that all convictions shall be returned to the Quarter Sessions, and how far they shall be evidence in future cases; (*q*) and sect. 41 contains the usual provision for the protection of persons acting *bonâ fide* under the provisions of the act. (*r*) It will be found that these several enactments in the 7 & 8 Geo. 4, c. 30, are in general the same as those in the 29th Chapter of the same session; and the prescribed form of conviction is the same, excepting that the words in italics are to be omitted when proceeding under chap. 30.

Fourthly, Proceedings on the Game Act, 1 & 2 W. 4. c. 32, giving summary proceedings for trespasses in pursuit of game.

The statute 1 & 2 W. 4, c. 32, contains some strong summary measures for the preservation of Game and Rabbits; sect. 12 subjecting even the tenant or occupier to a penalty of 2*l*. if he pursue or give permission to others to pursue, kill, or take *game* upon land in his own occupation, when the right to the game is exclusively in his landlord or another person, and also to 1*l*. for every head of game killed by him, recoverable before two justices; and sect. 24 subjects all persons to a penalty of 5*l*. for every destroyed egg of any bird of game, or of swan, wild duck, teal, or widgeons, recoverable before two justices; and sect. 3 subjects any person to a penalty not exceeding 10*l*. for laying poison to destroy or injure game, recoverable before two jus-

(*n*) See *ante*, 138, note (*t*).
(*o*) Id. sect. 38.
(*p*) Id. sect. 39.
(*q*) Id. sect. 40.
(*r*) Id. sect. 41.

tices. And sect. 30 subjects all trespassers in the day time in pursuit of game, to a penalty of not exceeding 2*l.*, recoverable before one justice; and if five or more be assembled together in the day time for the same purpose, they shall forfeit 5*l.*, also recoverable before one justice: and other penalties are imposed by the same act. But the 35th sect. contains an exception in favor of persons hunting or coursing with hounds, or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, or to any person *bonâ fide* claiming free warren or free chace, and of game-keepers within their proper manors.

But this act directs all the penalties to be paid to the overseers of the poor, in aid of the county rate. It then prescribes the times for commencing the prosecution and for payment of penalties. The form of conviction—mode of compelling the attendance of witnesses—prescribes that personal service of a summons on the party accused, *or leaving the same at his usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate*, shall suffice, or the magistrate may issue his warrant to apprehend, *in the first instance*, upon information upon oath that the party is likely to abscond. The act then gives an appeal, but takes away any removal by *certiorari*, or otherwise.

Constructions and operation of the four recent acts.

It will be observed, that the four enumerated acts introduce summary proceedings for punishment, and sometimes for satisfaction for very numerous small injuries which would not be the fit subjects of indictment; but, at the same time, they take from justices the investigation of a case, where a *bonâ fide* right is fairly in contest.

Construction of Common Assault and Battery Act, 9 G. 4, c. 31.

Thus, the 9 Geo. 4, c. 31, gives jurisdiction to two justices in case of *common assaults or battery* of the person; but if they find the same to have been justifiable, or so trifling as not to merit any punishment, they are to dismiss the complaint; and if *they find* that the assault or battery was accompanied by any attempt to commit a felony, (which is indictable as a misdemeanor,) or shall be of *opinion* that the same is, from any other circumstance, a fit subject for prosecution by indictment, they shall abstain from any adjudication, and shall then deal with the case as if the act had not been passed; *i. e.* they shall bind the party over to appear at the sessions or assizes, there to defend an indictment. And justices are expressly prohibited from determining any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or heredita-

ments, or any interest therein, or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any Court of Justice. (*s*) But as the justices are to *find*, or be of *opinion*, that the common exception is established, it seems, that although they proceed to convict in a case of assault, apparently with intent to commit a felony, the Court of King's Bench will not interfere on *certiorari* to quash the conviction, the justices not having, by their conviction, found the intent to commit a felony. (*t*)

Construction of Petty Stealing Act, 7 & 8 G. 4, c. 29.

The 7 & 8 Geo. 4, c. 29, we have seen, authorizes summary convictions for many small takings with intent to steal, in the *nature of larceny*, but which are *not indictable;* and authorises, on the oath of a credible witness, a *search warrant* for the stolen property; and enables the justice, in express terms, even after conviction, to discharge the offender upon his making such satisfaction to the party aggrieved for damages and costs, or either, as shall be fixed by the justice. So that a summary proceeding under this act, may be the means of obtaining satisfaction for the private injury, although the party aggrieved may himself have been a witness in support of the information.

But in order to sustain a conviction for taking away an article under this act, the information must have charged the offence in substance, within the terms of it; and on an information for maliciously damaging and taking away a post, intended to be framed on the 30th chapter, a conviction of taking away cannot be sustained (*u*) So with reference to the decision on the statute 5 Geo. 3, c. 14, for taking and destroying fish, the information and conviction must specify the number of fish taken. (*u*) The proceedings on the act 7 & 8 Geo. 4, c. 29, should also state the number.

Construction of Malicious Injury Act, 7 & 8 G. 4, c. 30.

The 7 & 8 Geo. 4, c. 30. s. 24, only applies to *wilful* or *malicious* injuries; but it is not necessary that the act should have been *malicious* to the owner, and the words are in the disjunctive, wilful *or* malicious; (*w*) but it must be charged and proved to have been either wilful or *malicious*. (*x*) This act only extends to *damage, injury*, or spoil, of real or personal property, public or private, and does not include a mere illegal *taking or stealing;* and therefore where upon a charge of wilfully and maliciously cutting, spoiling, taking and carrying away

(*s*) 9 Geo. 4, c. 31, s. 29.
(*t*) *Ante*, 133, note (*q*).
(*u*) *Rex* v. *Harpur*, 1 Dowl. & R. 222, *post*.
(*v*) *Rex* v. *Marshall*, 2 Keb. 594; and see *Queen* v. *Burnaby*, 2 Lord Raym. 900; 1 Salk. 181; but when not, see *Rex* v. *Rabbitts*, 6 Dowl. & R. 341.
(*w*) *Ante*, 139, 140.
(*x*) *Rex* v. *Turner*, Russ. & M. C. C. 239.

a post out of a fence, the defendant was only committed for wilfully and maliciously *carrying the post away*, the Court held such commitment bad, and discharged the defendant (*x*) The act complained of must have occasioned an *actual* and *real* damage, and not a mere damage in law, as by walking over the complainant's field, whether in asserting a right of way or otherwise. (*y*) But the unnecessarily wounding and really injuring a small dog, barking at the party, was held an injury within the meaning of the act (*z*). Justices also, under this act, are not to award a sum as a penalty in punishment of the wrong doer, but only a *reasonable compensation* for the damage, injury or spoil, not exceeding 5*l.*; they must therefore, in each case, duly ascertain the real amount of the injury, and limit their adjudication accordingly. (*a*) The enacting clause, we have seen, contains a provision that the act shall not extend to any case where the party trespassing acted under a *fair and reasonable supposition*, that he had a right to do the act complained of; nor to any trespass *not* being wilful and malicious, committed in hunting, fishing, or in pursuit of game (provided for by the 2 & 3 W. 4, c. 32.); but that every such trespass shall be punishable in the same manner as before the passing of the act. But it has been held, that the cutting a shrub, upon pretence of its being likely to become injurious to an adjoining wall, is within the act, although the title to the spot on which the shrub grew was in dispute; the maliciously destroying a shrub or a tree of immature growth, being an irretrievable injury, and not an act that can be necessary in the fair assertion of a right; (*b*) and the proviso is also confined to *bona fide*, and not mere colorable claims of right, as a pretended excuse, known to the party to be unfounded. (*c*) The information and conviction in this act, when for damaging several articles, ought to specify the number at least; it was so held upon a summary proceeding, on the 43 Eliz. c. 7, s. 1, against cutting trees, and where it was held, that the information and conviction were defective for not mentioning the number of the trees cut, being the measure of the damages to be given for the injury; and yet the number stated need not be proved precisely according to the allegation. (*d*)

(*x*) *Rex* v. *Harpur*, 1 Dowl. & R. 222.

(*y*) *Butler* v. *Turley*, 1 Mood. & M. 54; 2 Car. & P. 585; *Dewey* v. *White*, M. & M. Cas. N. P. 56; *ante*, 1 Vol. 409, 410.

(*z*) *Hanaway* v. *Boultbee*, 2 Mood. & M. 15; 4 Car. & P. 350, S. C.; *ante*, 1 Vol. 625, 6.

(*a*) *Rex* v. *Harpur*, 1 Dowl. & R. 222.

(*b*) *Rex* v. *Whateley*, 2 Man. & Ry. Mag. Cas. 313.

(*c*) *Ante*, 1 Vol. 408, note (*d*).

(*d*) *The Queen* v. *Burnaby*, 2 Lord Raym. 900; and 1 Salk. 181; and see 2 Keb. 594; when not, see *Rex* v. *Rabbitts*, 6 Dowl. & R. 341.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

Construction of Game Act, 1 & 2 W. 4, c. 32.

The *Game* Act was intended to prohibit the mere occupier of land, as a tenant, from sporting, under a lease for not exceeding twenty-one years, granted before the act, and upon which no fine had been taken, although the lease did not except or reserve the game, but merely contained a clause, that the lessor should be at *liberty to enter* to shoot, hunt, fish, and otherwise sport; (*e*) but a small majority of magistrates, at the Kent Sessions, recently held otherwise, and that the lessee, under such a lease, had a right to kill game after the act came into operation. (*f*) It is clear, however, under the 8th section of the act, that if a lease be executed after the passing the act (*viz.* 5th Oct., A. D. 1831), containing merely a right of entry for the lessor to kill or take game, although the game be not *reserved*, the lessee would have no right to sport. It has been holden, that as the 39th section gives a *general* form of conviction, (though it in terms requires a specification of time and place, where the offence was committed,) yet a conviction, alledging that the defendant on, &c., in the parish of, &c., did commit a trespass by entering in the day time of that day, *upon certain land* there, in the occupation of *A. B.*, in search and in pursuit of game, contrary to the statute in that case made and provided, whereby he forfeited a sum not exceeding two pounds, was sufficiently certain, although it was objected, that it should have averred that the trespass was in a close called, &c., because the name of the close and the nature of the land, are immaterial, and the occupier is not to have any part of the penalty, and any body may be the informer. (*g*)

Similarity in the several statutes of this nature.

It will be observed, that many of the enactments to be found in the acts of 7 & 8 Geo. 4, c. 29, and c. 30, and in 9 Geo. 4, c. 31, and in several other statutes, are in the same words, or nearly so; and that when they contain enactments *in pari materia*, the decisions upon the clause in one act, will in general, or very frequently, equally apply to a similar clause in another act. But there are some important distinctions as regards the *number* of justices who must convict, or the charge being *on oath*, or the requisite of the summons being *personally served* in some cases, when not essential in others; and there are some other differences for which it is difficult to account, but which render it indispensably necessary in each case, to

(*e*) Id. sect. 7 & 12.

(*f*) East Kent September Sessions, A. D. 1833; *Lord Guildford* v. *Boys*.

(*g*) Per Taunton, J. in Bail Court, Leg. Observer, A. D. 1833, 6 Vol. 378; *R.* v. *Mellor*. But, in general, the *particular* circumstances must be shewn with certainty in a conviction; *Ex parte Smyth*, 3 Dowl. & R. 461, and *post*.

observe great care in examining the statute, to ascertain what steps are essential.

SECONDLY, PRACTICAL PROCEEDINGS TO ENFORCE COMPENSATIONS OR PENALTIES.

The proceedings under these statutes, whether for *damages* or *penalties*, as well as for *all offences* punishable *summarily*, before one or more Justices of the Peace, in their natural order, may be arranged as in the analytical order at the commencement of this chapter, being the following heads.

First, within what time an information must be exhibited or commenced.

With respect to the *time* within which a summary proceeding before a justice or justices must be commenced, it in general depends on the terms of the particular statute giving the penalty or remedy. We have seen that all the recent acts of a general nature require that "the prosecution be commenced within *three calendar months after the commission of the offence.*" (*h*) If the particular act should omit to prescribe any time, then the 31 Eliz. c. 5, s. 5, would apply, and render it necessary to proceed within one year. Some acts, as the General Highway Act, 13 Geo. 3, c. 78, s. 75, prohibit the commencement of a summary proceeding until after the lapse of *some time*, and even require ten days' notice to the offender, of the intended prosecution for a penalty. The General Turnpike Act, 3 Geo. 4, c. 126, s. 143, even requires twenty-one days' notice to the offender. (*i*) In one instance, under the now repealed game laws, the statute even required that the *conviction* should be within three calendar months, and which was held imperative; and that although the final hearing and conviction stood over beyond the limited time at the request of the defendant himself, yet a subsequent conviction was invalid. (*k*) But in general the acts merely require that the prosecution be *commenced* within a named time, and in that case a conviction may take place at any subsequent time. (*l*)

Month, how construed.

With respect to the term *month*, unless expressly declared otherwise, it is, in statutes relative to summary proceedings, and convictions, and in Courts of law and equity, generally construed to be *lunar*; (*m*) though when the question relates to

(*h*) 9 Geo. 4, c. 31, s. 34, *ante*, 132; 7 & 8 Geo. 4, c. 29, s. 64, *ante*, 135, id. chap. 30, s. 29, *ante*, 130; Game Act, 1 & 2 W. 4, c. 32, s. 41; *ante*, 142.

(*i*) *Towsey* v. *White*, 5 B. & Cres. 125; 7 D. & R. 810; and see *Freeman* v. *Line*, 2 Chitty's Rep. 673, as to the requisite form of notice to a Toll-gate collector.

(*k*) *Rex* v. *Tolley*, 3 East, 467; *Rex* v. *Bellamy*, 1 B. & Cres. 500; 2 Dowl. & R. 727, S. C.

(*l*) *Rex* v. *Barrett*, 1 Salk. 383.

(*m*) 3 Burr. 1455; *Rex* v. *Bellamy*, 1 B. & Cres. 500; 2 Dowl. & R. 727, S. C. So in equity, 2 Sim. & Stu. 476.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

ecclesiastical affairs, (*n*) or commercial or nautical subjects, it is generally otherwise. (*o*)

When the first day, to be excluded.

The decisions are contradictory whether the *day* of committing the offence is to be construed *inclusively* or *exclusively*, and therefore no risk should be incurred in that respect by unnecessary delay. The rule formerly laid down was, that when a statute directs that the prosecution shall be commenced within a specified number of days or months, "*from the committing of the offence*," then the day on which it was committed should be *included* in the calculation; but that when the act prescribed the limitation *from the day* of doing the act, then the whole of that day should be excluded; (*p*) and certainly till of late that doctrine prevailed, and it was held that the limitation of the time of commencing an action against a justice, was to be *inclusive* of the day of his doing the act complained of. (*q*) It will be observed that by this rule of construction, the party had in truth less time allowed him than the legislature apparently intended; for if the offence were committed near the last instant of a day, then by including in the calculation that day, he had nearly one entire day less than the three months or other limited time, within which he must have commenced his proceeding. The propriety of this rule having been considered, and denied by the Master of the Rolls; (*r*) the subject was recently brought under the consideration of the Court of King's Bench in two cases, which establish that the first day ought to be *excluded*, at least in cases where the party injured may not immediately know of the injury to his property; as in proceeding against the hundred for a demolition by fire, when the act requires that the owner of the demolished building, or his servant, shall, "*within seven days after the commission of the offence*," go before a justice and submit to examination respecting it; and it was held that such seven days are to be calculated *exclusive* of the day on which the damage was committed; (*s*) and it was also held, that if a person be released from his illegal imprisonment on the 14th December, it suffices to commence his action against the magistrate who illegally imprisoned him,

(*n*) In case of non-residence, the month is construed to be *calendar*; 2 Rol. Ab. 521; Com. Dig. tit. Ann. B.; Hob. 179; 1 Bla. R. 150; 1 Bing. 307; 1 M. & S. 111.

(*o*) 1 Stra. 652; 1 Maule & Sel. 111; 6 Maule & Sel. 227; 3 Brod. & B. 187; 1 Esp. Rep. 186.

(*p*) Per Parker, C. J., in *Rex* v. *Green*, 10 Mod. 112; *Rex* v. *Adderly*, Dougl. 465; *Rex* v. *Bass*, 5 T. R. 251; Paley on Convictions, by Dowling, 1 Vol. 16.

(*q*) *Clark* v. *Davey*, 4 Moore, 465; but *semble* overruled by *Hardy* v. *Ryle*, 9 B. & Cres. 603.

(*r*) 17 Ves. 248.

(*s*) *Pellew* v. *Inhabitants of Wonford*, 9 B. & Cres. 134.

on the 14th June following, because the whole of the last day of imprisonment is to be *excluded* in the calculation. (*t*) These recent decisions appear sufficiently to establish, that in general, as regards summary proceedings for offences or injuries of a private nature, the rule will now be to *exclude* the *first day*. But this is not yet quite established as a universal rule, for in the latest case upon the calculation of time under the Bankrupt Acts, it has been decided that if a seizure be made under a *fieri facias*, it will not be defeated unless a commission or fiat in bankruptcy be issued within two months after, and that the day of the seizure, in that case, is to be *excluded* in the calculation of time. (*u*) It seems difficult to reconcile these contradictory decisions. (*v*)

It has been supposed that if two informations for the same offence should be exhibited on the same day, they would mutually abate each other. (*w*) But that doctrine was entertained at a time when it was a maxim that there could not be any fraction of a day, which is now abandoned, when the precise hour when a fact took place is capable of being ascertained; and now undoubtedly the validity of the information first exhibited would not be affected by a subsequent information on the same day.

Secondly, who to prosecute.

Although the recent three general acts relative to *private* injuries to the person or to personal or real property describe the injury as an *offence*, yet in some instances only the *party injured can* be the complainant. (*x*) The 9 Geo. 4, c. 31, s. 27, is express, that the complaint for a *common* assault or battery shall be by the *party aggrieved*, and consequently no other person can carry on a proceeding under that act; and when the party injured has prosecuted summarily, he cannot also sue at common law. (*y*) And although the 7 & 8 Geo. 4, c. 29, s. 75, and *id.* c. 30, s. 36, are not so express in this respect, and merely require that the summons shall be issued on the oath of a *credible witness*, (*y*) yet in case of injuries to *private* property, and

(*t*) *Hardy* v. *Ryle*, 9 B. & Cres. 603; 4 Man. & Ry. 300; and see Com. Dig. Temps, A.; 2 Campb. 254; 5 T. R. 283; 3 B. & Ald. 581.

(*u*) *Godson* v. *Sanctuary*, 4 B. & Adolp. 255; 1 Nev. & Man. 52, S. C.; and see 3 Young & Jerv. 15, 16.

(*v*) See the cases as to time in general, Chitty's Col. Stat. tit. Time, and Com. Dig. tit. Temps. N. B. As far as regards the *practice* of the Courts, the 8th Rule, Hil. T. 1832, establishes that the first day should be excluded.

(*w*) Hawkins, P. C., Book 2, chap. 26, sect. 63.

(*x*) This is generally so when the whole penalty is given to a party aggrieved; *Rex* v. *Daman*, 2 B. & Ald. 378; 1 Chit. R. 147; and see *Rex* v. *Harper*, 1 Dowl. & Ry. 222; 1 Mag. Cases, 67, decided on the now repealed Malicious Trespass Act, 1 Geo. 4, c. 56; or it must appear that the proceeding is with his concurrence, id. ibid.

(*y*) 9 Geo. 4, c. 31, s. 27; 7 and 8 Geo. 4, c. 29, s. 70, id. chap. 30, s. 36.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

when the damages are given in the first instance to the owner, it should seem that the information must be in the name, or at least at the instance of or with the concurrence of the party aggrieved, to whom the damages are to be paid (unless he give evidence), and whose private remedy by action is to be barred by a conviction on the summary proceeding, and payment, imprisonment, or remission by the Crown; a provision which would not have been enacted if any common informer could have prosecuted.(z) But where a wilful or malicious injury has been committed to *public* property, as to a bridge, church, &c., then perhaps *any* person may be the prosecutor.(a)

With respect to the *Game Act*, 1 & 2 W. 4, c. 32, whether the proceeding is against the occupier, under the 12th section, or against any other trespasser, under the 30th section, or for any other of the several penalties imposed by that act, (all which are to be paid to the overseer or officer in aid of the general county rate, and the informer is not entitled to any proportion under the 37th section,) *any* person may be the informer. The Game Act, however, in section 46, provides that the party injured may sue for the trespass at common law, unless he has instituted the prosecution for the penalty.

As the statutes 7 and 8 Geo. 4, c. 29, s. 65, and c. 30, s. 30, require the oath of a *credible* witness as to the committing of the offence, before the justice can issue his summons; it should seem that the complainant or informer, or at least some person in support of the complaint, must be a *credible* witness, and not a party who has been convicted of any offence which would render him incompetent. The game act, 1 & 2 W. 4, c. 32, s. 41, also requires the oath of a *credible* witness, before the justice can summon the supposed offender.

As the 9 Geo. 4, c. 31, s. 27, merely requires the complaint of the party aggrieved, without requiring that such *complaint* shall be on oath, any party aggrieved, however objectionable in point of credit, might make the charge under that act, although before he could obtain a summons, there must, under section 33, be the deposition of the offence by a *credible* witness. It has been held, that when an act gives a penalty to *any* informer, then any person whatever may lay the information; although when interested in the penalty, he would not afterwards be a competent witness upon the *hearing*.(b) But that where the

(z) See in general *Rex* v. *Daman*, 2 B. & Ald. 378; 1 Chit. R. 147; and see 7 and 8 Geo. 4, c. 29, s. 70; and id. c. 30, s. 36; see also *Rex* v. *Harpur*, 1 Dowl. & R. 222; 1 Mag. Cas. 67. S. P. decided on the prior Malicious Trespass Act, 1 Geo. 4, c. 56.

(a) 7 and 8 Geo. 4, c. 30, s. 24.

(b) 2 Lord Raym. 1545.

statute gives the penalty, or a part, to a party *aggrieved*, or requires in express terms that the complaint shall be by him, then it must appear either that he made the complaint or exhibited the information, or at least that it was *at his instance*.(c)

In cases where any person may be the informer, it will be obvious that no person who could give material evidence should be placed in that situation which would exclude his testimony, but the information should be in the name of another person, and the witness's testimony reserved until the hearing.(d) The law as to who may be an informer, under the late excise and custom regulations, and indeed all the proceedings in those cases, will be found collected in Burn's Justice, title Excise and Customs.(e) Sometimes it becomes a question of difficulty who is to be deemed the informer, as where rewards are to be paid to the first informer; and in the Exchequer it has been held that the person who informs the *Court*, that is, the person in whose name an information has been filed, is to be considered the informer.(f)

Summary proceedings on justice's own *view*.

Particular statutes (as the General Highway Act, 13 Geo 3, c. 78, s. 6,) authorize a justice to convict upon *his own view;* but if a driver of a cart refuse to inform him the name of the owner, this does not justify the magistrate in stopping the cart and horses in order to examine the board, although the driver wilfully placed himself before the board on which his master's name was painted; and it was holden that the magistrate was liable to an action of trespass.(g) The justice's view must also expressly be stated.(h)

Thirdly, Against whom.

In general, the proceeding can be only against a party actually present and committing the offence; but a *principal* who instigates the prohibited injury, although absent, may be proceeded against for the act of his agent or servant; and *masters*(i) as well as *partners*(k) are frequently *liable* to penalties for the

(c) *Rex* v. *Daman*, 2 B. & Ald. 378; 1 Chit. R. 147, S. C.; with the full notes; and see *Rex* v. *Harpur*, 1 Dowl. & Ry. 222; 1 Mag. Cases, 67, S. C.

(d) *Rex* v. *Stone*, 2 Lord Raym. 1545; *R.* v. *Tilley*, 1 Stra. 316; *R.* v. *Piercy*, Andr. 18.

(e) 26th edit.

(f) *Sanders* v. *Bevan*, 7 Feb. 1786, MS. In cases of rewards for intelligence, the party *who communicates* that information to the party interested, is entitled, and not the mere private narrator; 1 Maule & Selw. 108; as to a *division* of a reward between several, 3 Wentw. 30.

(g) *Jones* v. *Owen*, 2 Dowl. & Ry. 600.

(h) *Rex* v. *Justices of Kent*, 10 B. & Cres. 477.

(i) *Mitchell* v. *Toruss*, Parker, R. 227; *Rex* v. *Dixon*, 3 M. & S. 7; and see liability of principal for acts of agents and servants in general, *ante*, 1 Vol. 78, 79; *Attorney General* v. *Siddon and Binns*, 1 Tyr. Rep. 41.

(k) As to Partners, Bunb. 223; Comyn. Rep. 616; 5 Burr. 2686; 5 T. R. 649.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

acts of their servants or partners in the course of their employ or joint trade, although absent and not actually authorizing the commission of the offence. *Married women* (*l*) and *infants* (*m*) are in general liable for trespasses and torts unconnected with contract, and may be prosecuted for penalties under these acts. But it has lately been considered that as infants cannot *contract*, therefore an infant could not be legally punished by magistrates under the 4 Geo. 4, c. 34, as a *servant* neglecting to fulfil his contract. (*n*)

As respects the *number of offenders*, when several are jointly guilty, they may be proceeded against accordingly, and they incur only one or several penalties according to the terms of each particular enactment. (*o*)

The 9 Geo. 4, c. 31, s. 27, is silent as to any difference in the penalty of 5*l.* when several are concerned in a common assault and battery, and therefore only one penalty could be adjudged for a joint injury. But the 7 & 8 Geo. 4, c. 29, s. 66, as to petty takings of property not indictable, supposes that several persons may have jointly committed the injury, and subjects each to a separate forfeiture to the extent of 5*l.*, though the party aggrieved is not to receive more than 5*l.*, and the other forfeitures to be paid to the use of the county rate; and the 7 & 8 Geo. 4, c. 30, s. 32, relating to malicious injuries, contains a similar provision.

The *Game Act* is silent as to the *number* of offenders, excepting in the 32d section of the act (1 & 2 W. 4, c. 32), when if the number of trespassers in the day-time exceed four, and any one be armed with a gun and is guilty of violence, intimidation, or menace, as specified in the act, *each* of them incurs a penalty of not exceeding 5*l.* recoverable with costs on conviction before two justices.

Fourthly, Before what justice or justices.

As justices of the peace have in general jurisdiction only over offences committed within their own county, and offences are also generally local, every information upon which to obtain a conviction should be laid before a justice or justices of the county in which the cause of complaint arose, and who is to

(*l*) *Rex* v. *Croft*, 2 Stra. 1120.

(*m*) 2 Bos. & Pul. 93; id. 530; 8 T. R. 545; Hawk. B. 1, c. 1, s. 10; 4 Bla. C. 308.

(*n*) Upon the authority of 1 Hawk. P. C. c. 64, s. 35, by Justices of the Borough of Newcastle, A. D. 1833; *sed quære*, for a married woman cannot in general make a *contract*; but nevertheless she may be separately convicted of *selling* gin; *Rex* v. *Crofts*, 2 Stra. 1120.

(*o*) When only *one* penalty; 4 T. R. 809; 2 T. R. 712; 2 East, 573; when *several*, 2 East, 573; under the Toleration Act, several; 1 New R. 245; *Rex* v. *Clarke*, Cowp. 612; 5 T. R. 542.

receive the information and issue the summons or warrant. (p) The numerous enactments so vary in their provisions, whether the offence is determinable by *one* or two justices, that in each case it is necessary to examine the particular enactment creating the offence or authorizing the summary proceeding. Thus we have seen that a complaint for a common assault or battery must be determined by *two* justices, (q) whilst petty takings or small malicious injuries may in general be determined by one justice. (r) The convictions for second offences are in general more severely punished by *two* justices. (s) Under the Game Act, *one* justice in general has jurisdiction. (t)

When a statute requires a conviction or other *judicial* act by *two* justices, then a conviction by *one* would be void, and the two must meet and jointly together hear all the evidence, and consult together and be present when they actually conclude and determine upon their conviction, (u) though it is said to be immaterial as to the time when the magistrate puts his subscription and seal, provided he concurred in the conviction so as to make it the result of his judgment after hearing the evidence; (v) but as the signing and sealing constitute the legal evidence of the consummation of the resolution to convict, (w) and something might occur to alter the decision if both the justices were present at the signature, it may be at least questionable whether both must not then be present.

In *ministerial* acts to be done by *two* justices, it is true that it has been held to suffice, although the signatures and actual concurrence of each take place when they are separate; but the circumstance of an act being *judicial*, that is, the act of mental consideration and decision after discussion, makes the legal difference. (x) As far, however, as respects even the *judicial* act of two justices approving of the binding of an apprentice, it has been held to be sufficient although one magistrate sign the indenture when he be alone, provided he be afterwards present when the other executed it, and they both then agreed to the propriety of the measure. (y)

However, in all cases, whether *one* justice has or not ab-

(p) 21 Jac. 1, c. 4. s. 1; and see *Kite* v. *Lane*, 1 B. & Cres. 101.

(q) 9 Geo. 4, c. 31, s. 27.

(r) 7 and 8 Geo. 4, c. 29, s. 65; and id. c. 30, s. 24.

(s) 7 and 8 Geo. 4, c. 29, s. 31; id. s. 39. 40, 43.

(t) 1 and 2 W. 4, c. 32, s. 41.

(u) *R.* v. *Redware*, 3 T. R. 380; *Battye* v. *Gresley*, 8 East, 319; *R.* v. *Coln St. Aldwins*, Burr. Sett. C. 136; *R.* v. *Forrest*, 3 Term R. 38; 2 East, 244.

(v) *R.* v. *Picton*, 2 East, 198; *R.* v. *Barber*, 1 East, 185.

(w) *Sharrington* v. *Strotten*, Plowd. 308.

(x) *Supra*, note, Dalt. Ch. 6.

(y) *R.* v. *Winwick*, 8 T. R. 454; *R.* v. *Stotfold*, 4 T. R. 596.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

solute power alone to convict, it is always competent, and in general advisable, for *two* or more to concur,(z) as it better avoids mistakes, either in jurisdiction or decision on the merits, and is calculated to prevent any suspicion of partiality or other injustice. Another advantage may result from proceeding before *two* justices, viz. that of avoiding an appeal in some cases; for when a conviction has been before *two* justices, under the 7 & 8 Geo. 4, c. 29, and also c. 30, no appeal is given, although if the conviction had been by only *one* justice, the party might have appealed; and therefore it is obviously advisable, in cases under those acts, to obtain the conviction of *two* justices.

In general an information may be before *one* justice; and his summons, though to appear before *two*, suffices.

By express enactment, however, it suffices in general *to lay an information* before, and obtain the *summons* or warrant from, *one justice*, although *two* or more justices may, by a particular act, be required to determine and convict; for as the receiving the information and summoning the party are mere ministerial offices not requiring much judgment, they may be safely delegated to one justice, although it may be proper that the final decision should be by *two*.(a)

Justices not to be interested.

It is a general rule, that no justice should act in any case in which he is interested,(b) or where he may be supposed to be prejudiced; and in some instances this is particularly prohibited, as by the 1 & 2 W. 4, c. 37, prohibiting the payment, in certain trades, of workmen's wages in goods or otherwise than in coin, and which enacts that no justice, being a person also engaged in any of the trades or occupations enumerated in the act, or even the father, son, or brother of any such person, shall act as a justice under that act.

If a magistrate were wilfully and corruptly to convict in a matter in which he is interested, and decide in his own favour, a criminal information would probably be granted against him, or he might be indicted; (c) and where two justices agreed reciprocally to convict upon each other's informations under the former Game Act, it was decided that they were indictable for their conspiracy. So, where a magistrate, upon whose property a malicious trespass had been committed, issued a sum-

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(z) Dalton's Justice, chap. 6.

(a) 3 Geo. 4, c. 23, s. 2.

(b) *Ante*, 83, 4; 3 Bla. Com. 299; and per Lord Stowell, in case of *Two Friends*, 1 Rob. Rep. 282; and see the observations in Dalton, J. chap. 173; 1 Inst. 377; Burn J. Justice, IV. 3 Vol. 26th edit. 472, 3; *R.* v. *Guddcridge*, 5 B. & Cres. 459; 8 Dowl. & Ry. 217; and 4 Dowl. & Ry. Mag. Cases, 35, S. C.

(c) *Case of the Mayor of Hereford*, who was imprisoned for such an offence; 1 Salk. 396; and *R.* v. *Otway*, 2 Burr. 653; *R.* v. *Hann and another*, 3 Burr. 1716.

mons requiring the offender to appear before himself, or some other magistrate, and purporting that information had been given to him the magistrate on oath, whereas no oath had been taken, and the information had been communicated by the magistrate to the informer, the Court, in discharging a rule for a criminal information against the magistrate, refused to give him his costs. (*d*)

In general, a county justice has jurisdiction over offences committed throughout the county; but it must not only appear that he is a justice of the county, but also that the proceeding is within its limits. (*e*) If the jurisdiction be given to a justice *in or near* a parish or place, or acting for the division, this is only directory, and any justice of the county may act; but if the authority is only to the *next* justice, then he only can act. (*f*)

Fifthly, Of the information or complaint.

It will be obvious that on every principle of justice, in order that the defendant may be apprised of the supposed offence he is to answer, and the magistrate what facts he is to try and adjudicate, and that the conviction or acquittal may be adducible in evidence, to prevent a subsequent proceeding for the same cause, there ought to be *a formal charge*, and which is sometimes termed a *complaint*, but more generally, at least as respects proceedings for a penalty, an *information;* (*g*) for, although there are some cases in which no charge in *writing* may in strictness be required, yet a charge or accusation must *in fact have been instituted*, and the justice before whom it has been made, should take down in writing the substance, in order afterwards duly to frame his summons or warrant, or limit the inquiry. (*h*) The only cases in which a previous information or charge is dispensed with, are those where *a justice* is authorized to convict on his *own view*. (*i*)

The form and strictness required in general.

Although in practice under the enumerated recent acts, giving summary proceedings for private injuries, the party aggrieved may go before a *single magistrate* and *verbally* state his complaint, and which is then incorporated in a printed form; yet, when time will allow, and especially in cases of the least difficulty, it is advisable previously, deliberately and carefully, to

(*d*) *R.* v. *Whateley*, 2 Man. & Ry. Mag. Cases. 313.

(*e*) *R.* v. *Dobbyn*, 2 Salk. 473; but see *R.* v. *Chipps*, 1 Stra. 711.

(*f*) *Sanders' case*, 1 Saund. 263, and notes, 2 Keb. 559; *R.* v. *Price*, Cald. 305; and see in general Burn J. tit. Justices of Peace.

(*g*) Lord Raym. 500; *Brookshaw* v. *Hopkins*, Loft, 240; and see Mr. Serjt. Williams' observations on *Sanders' case*, 1 Saund. Rep. 262, note 1.

(*h*) *R.* v. *Fuller*, 1 Lord. Raym. 510; *Brookshaw* v. *Hopkins*, Loft, 240.

(*i*) *Jones* v. *Owen*, 2 Dowl. & Ry. 600.

frame a *written information*, and then to take the same to the magistrate, who is not bound to prepare it, nor is responsible to the informer for its accuracy, but is merely to *receive* the information, unless indeed in cases where an oath of the offence is required, when it is incumbent on the justice before he issues any summons or warrant, to ascertain that a complete offence has been sworn to. The frequency of summary prosecutions failing, either in the first instance or after *conviction*, which has been quashed, is attributable to the defect in the information, and therefore more care is essential in framing the same than is usually observed. Before we consider the parts and requisites, it is a good general rule that an information should be framed with as much care as an indictment or declaration, and the rules of pleading affecting them, should be cautiously consulted and adhered to.

The usual form of information.

The *usual form* of information in the books, (*k*) rather resembles a record or memorandum of an information having been *previously* exhibited than the information itself, which should be in the form subscribed, (*l*) especially if it be in the least apprehended that the justice will improperly refuse to receive or act upon that produced to him, or upon the verbal statement upon oath of the applicant and his witnesses.

The *substance* of the particular complaint must necessarily vary in each case. As the object of the information is to limit the informer to *a certain charge*, in order that the defendant may know what he has to defend, and the justice limit the evidence and his subsequent adjudication to the allegations in the information; it will be obvious, that in general it ought to be in substance as certain and technical as an indictment or declaration; and although it has been observed, that these summary proceedings ought not to be entangled in *greater* forms or ceremonies than the superior Court, yet on the other

(*k*) See Burn's Justice, tit. Convictions.

(*l*) See a short form, Burn, J. 26th edit. tit. Assault. The following form may in general be adopted.

A general form of information on the recent acts, or on any penal statute.

Middlesex.—The information and complaint of *A. B.*, of the parish of ——, in the county of ——, yeoman, made and exhibited before *E. F.*, Esq. one of His Majesty's Justices of the Peace of and for the said county of ——, on the —— day of ——, in the year of our Lord 1833, at ——, in the said county, upon his oath, duly administered to him, and who upon his oath saith: That on, &c. at, &c. *C. D.*, of, &c. did, &c. [*here state the offence, and if contrary to a statute which created it, conclude*] contrary to the statute in that case made and provided; whereby the said *C. D.* forfeited for his said offence the sum of 5*l.*; and thereupon the said *A. B.* prayeth that the said *C. D.* may be summoned to answer the premises before one [*or* two] of His Majesty's Justices of the Peace in and for the said county.

Sworn before me, *E. F.* *A. B.*

See *several forms* on the recent acts, at the end of this head of Informations.

hand, proper form must not be set at nought; (*m*) and the mistatement or omission of any material averment in the *information*, is not cured by any statement in the *conviction* of *sufficient evidence* to constitute the offence, because the defendant can only be convicted of the charge *as laid* in the *information*, and *that* must be sufficient to support the conviction, and the evidence could only *prove*, and not supply, the defects in the information. (*n*) And it is a rule with respect to summary proceedings before justices on penal statutes, that after a conviction, nothing can be intended, so as to get rid of any defect in point of form; for every thing necessary to support the conviction must appear *on the face* of the proceedings, and must be established by regular proof, or by the admission of the party of that which is proved. (*o*) So where the information and conviction omitted to negative *the exceptions* in the enacting clause, Lord Kenyon observed, that the proceedings could not be sustained, and that the objection was not of *form*, but of *substance;* because, as Serjt. Hawkins remarks, the defendant could not plead to such an information or conviction, and could have no remedy against it, but from an exception to some defect appearing on the *face* of it, and all the proceedings are in a summary manner, and therefore the conviction itself should show that the party accused had not any defence, which the act in its exceptions gives to him if true; and there is much good sense in what was said by Hawkins, (*p*) for being a summary proceeding and conclusive on the defendant, it ought to have the greatest certainty on the *face* of it. (*q*) Many defects in pleading in the *Superior Courts* are aided at common law after verdict, upon the presumption that the superior Judges knowing the law, would not have allowed the jury to find their verdict as they did, if the requisite facts to constitute the offence or cause of action had not been proved. (*r*) But in case of magistrates, no such presumption in favour of their general knowledge of every part of law can be safely acted upon; and therefore there is not to be the same intendment in favour of the correctness of their proceedings.

And, although it may have been enacted in a particular

(*m*) Per Lord Kenyon, in *R.* v. *Swallow*, 8 T. R. 286; and see the observations of Abbott, C. J. in *R.* v. *Paine*, 5 Bar. & Cres. 251; 7 Dowl. & R. who said "words and matters of form must be observed in informations and convictions, as in indictments."

(*n*) *R.* v. *Wheatmims*, Dougl. 232.

(*o*) Per Holroyd, J. in *R.* v. *Doman*, 1 Chit. R. 155; but see 3 Geo. 4, c. 23, *post*, 158.

(*p*) 2 Hawk. c. 25, s. 113.

(*q*) Per Kenyon, C. J. in *The King* v. *Jukes*, 8 T. R. 544.

(*r*) 1 Saund. 228, note 1; *Humphreys* v. *Pratt*, in Lords, 2 Dow. & Clark, 288; 1 Brod. & B. 224; 1 M. & S. 237; Tidd, 9th edit. 919.

statute (as indeed it has been by the general act, 3 Geo. 4, c. 23, s. 3), that when a *defendant has appeared and pleaded, and the merits have been tried*, no conviction shall be set aside *for want of form*, or through the mistake of any fact, circumstance, or any other matter, provided the *material* fact alledged were proved; still if the information and conviction omit to negative any defence under an excepting proviso, that is a defect in *substance*, and not aided as matter of *form*; (s) and there is no statute which aids proceedings before justices out of sessions *before* conviction. The 7 Geo. 4, c. 64, s. 20, as to indictments, does not extend or apply to informations before such justices; (t) and the general act 3 Geo. 4, c. 23, s. 3, regarding defects in form after conviction, still leaves the defendant on the hearing before the justice, at liberty to object to and defeat the information, in respect to many defects in form.

What defects in information aided, and when.

But an information for two distinct offences, or for a charge capable of being severed, although bad in part, or only proved in part, may be sustained as to the residue, if the objectionable part be so far abandoned that there is not an entire and indivisible conviction upon the insufficient as well as the valid part: so surplusage, that may be rejected will not prejudice in an information, any more than it would in an indictment or declaration. (u)

Information may be sustained in part, though bad as to the residue.

Surplusage, when it will not prejudice (u).

In practice it will be observed, that the information usually states the name and addition of the informer or complainant, and that on such a day, at a named place in the county of which the magistrate is a justice, he cometh before a named justice of the peace in and for the said county, and on his oath states, that, &c. (shewing the time and place of committing the particular offence; and when it was not an offence at common law, concluding) contrary to the statute in that case made and provided, whereby he forfeited and became liable to pay a named penalty or damages, &c. (as in the particular act), to be distributed or paid according to law; and then praying that proceedings thereupon may be duly had: and which information is usually signed by the informer, and he is to be sworn to the truth of the statement when the statutes require his oath.

Substance of the usual form.

Unless expressly or impliedly required, it is not necessary

When information must be in writing.

(s) *The King* v. *Jukes*, 8 T. R. 542.
(t) *Davies* v. *Bint*, 3 B. & Cres. 586.
(u) As to the effect of surplusage in indictments, see 1 Chitty's Crim. L. 294 to 296; and as to surplusage in *Civil Pleadings*, see 1 Chitty on Pleadings, 5th edit. 262 to 266, 426 to 428.

that the information should be *in writing*. But when so required, it is imperative. (*v*) In practice it is usual to have it in writing, so as to enable the magistrate correctly to frame his summons thereon, and to limit the subsequent evidence.

When information must be oath.

If the particular statute do not require the information to be *on oath*, then that form is unnecessary; (*w*) though the addition of that form will not prejudice. (*x*) But when *an oath* is required, then the magistrate cannot legally act unless such oath has been made; (*y*) and if a magistrate should grant his warrant to apprehend without oath of a felony committed, when required by law, trespass lies against *him*; (*z*) and where a magistrate illegally issued a summons in a case in which he was interested, falsely reciting that an information *on oath* had been made, although the Court discharged the motion against him for a criminal information, they refused him the costs of shewing cause, on account of such irregularity. (*a*) The statute 9 G. 4. c. 31. s. 33, and the 7 & 8 Geo. 4. c. 29. s. 65, and *id.* c. 30. s. 30, relating to summary convictions for common assaults and batteries, and for small takings not indictable, and for malicious injuries not indictable, require the *oath of a credible witness*, before the magistrate can be called upon to issue even a summons. (*b*) When swearing is necessary, it is said to be requisite that upon the face of the information itself it should appear to have been *on oath*; but as the swearing must naturally be after the information has been exhibited to the justice, it should seem only to be necessary to state the swearing in the *subsequent* proceedings.

Information may be brought to the justice ready prepared.

There is not perhaps any objection to an *information ready prepared* being presented to the justice, for him to swear the informer as to the truth, and it is not essential that it should be framed in the presence of the justice; at least it was so held as respected a ready prepared examination under the Hundred Act. (*c*) But as persons will sometimes incautiously and improperly, without due consideration of the facts, swear in the *very* terms of the act authorizing the summary proceeding, the proper course is for the justice, in all cases where the act re-

(*v*) *R.* v. *Wilks*, Bose. 16; *Basten* v. *Carew*, 3 B. & Cres. 649.

(*w*) *R.* v. *Willis*, Bose. 16; *Basten* v. *Carew*, 3 B. & Cres. 649; 5 Dowl. & R. 558.

(*x*) *Sanders' case*, 1 Saund. 262, note 1.

(*y*) *R.* v. *Kiddy*, 4 D. & R. 734.

(*z*) *Morcom* v. *Hughes*, 2 Term. R.

(*a*) *R.* v. *Whateley*, 2 Man. & Ryl. Mag. Cases. 313.

(*b*) And see *R.* v. *Whateley*, 2 Man. & Ryl. Mag. Cases, 313, as to malicious injuries.

(*c*) *Semble*, *Lowe* v. *Broxtowe*, 3 Bar. & Adolph. 550.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

quires the oath of a credible witness before issuing even a summons, to examine the witness as to the exact facts *after* he has been sworn; for we shall find, that at least upon the *hearing* of an information, the depositions ought to be taken in the *genuine language* of the *witness himself*, and not in compliance with the terms of the statute, (*d*), and that it is incorrect to prepare the *examinations* in the *absence* of the defendant, or *before* the witnesses have been sworn, or otherwise than before the justice, in the presence and hearing of the defendant, and when he may hear the questions as well as answers, and might at least suggest some further interrogatory. (*e*)

The complainant, either alone or with his witness, should, without being influenced by passion, resentment, or revenge, state to the justice the facts, precisely as they occurred, and without urging, or even soliciting, a warrant, against the justice's impression, leaving the justice to act as he may think fit; and then if *he* should mistake the law, or wilfully issue a warrant to apprehend the party accused, in a case when he ought not to have done so, then the informer and witness will be wholly free from liability, (*f*) unless indeed the party imprisoned can afterwards shew that the informer maliciously *pressed* the justice to issue his warrant. (*g*)

Name and description of the complainant or informer.

The information must be in the name of the *proper complainant*, either the party aggrieved, or a common informer, when the latter is allowed to proceed; in the former case, to shew that the information is by the proper party, and in the latter, to prevent the shifting of an informer, and to preclude the alleged complainant, when interested, from giving evidence, (*h*) and in all cases in order that the defendant may know who is his accuser. (*i*) The 9 G. 4. c. 31. s. 27, requires the *complaint* to be by the *party aggrieved* himself, though s. 33 authorizes a summons upon the oath of *any* credible witness. The 7 & 8 G. 4. c. 29. s. 65 & 66, and the 7 & 8 G. 4. c. 30. s. 24 & 30, relating as well to public as private injuries, supposes, even in cases of injuries to private property, that the party aggrieved may not be known, or that the property maliciously injured may be public; and therefore seem, in some

(*d*) *Cohen* v. *Morgan*, 6 Dowl. & Ry. 8; *In re Rix*, 2 Dowl. & Ry. Mag. Cas. 251; *Mills* v. *Collett*, 2 Man. & Ry. Mag. Cas 262; *Rex* v. *Marsh*, 2 B. & Cres. 717; 4 Dowl. & R. 260; 2 Mag. Cas. 182.

(*e*) *Rex* v. *Kiddy*, 4 Dowl. & Ry. 734; *Rex* v. *Swallow*, 8 R. T. 284.

(*f*) *Ante*, 1 Vol. 630, 674; *Cohen* v. *Morgan*, 6 Dowl. & Ry. 8.

(*g*) *Elsee* v. *Smith*, 2 Chitty's R. 304; 1 D. & R. 97; *Hensworth* v. *Fowkes*, 4 B. & Adolph. 449.

(*h*) *Rex* v. *Stone*, 2 Lord Raym. 1545.

(*i*) Paley on Conv. 80.

cases, to allow *any person* to inform and swear to the offence, so as to obtain a summons though if the injury were private, the party aggrieved is to have the compensation, unless he has given evidence. (*k*) But it is not necessary, although usual, to state the place of abode, or degree or addition of the complainant.

Where the statute upon which the proceeding is founded provides that a party *seizing* or *doing any other act* shall have part of a forfeiture or reward, then the facts should be charged accordingly in the information, or at least they must appear in the recital of the evidence, in the conviction as well as in the adjudication. (*l*)

In cases where a penalty is given partly to the informer and partly to the poor of a parish or other person, it is not necessary that the information should shew that it is made *qui tam.* (*m*)

The time of exhibiting the information.

It has been supposed that the information itself should shew *the time* when it was exhibited, in order that it may appear to have been within due time. (*n*) But this is an error; it is true that the *conviction* must shew that the information was exhibited in due time, (*o*) but it is not necessary that the information *itself* should shew when it was exhibited.

Place of exhibiting the information.

The same observation also applies to the supposed requisite that an information must shew *the place* where it was exhibited. (*p*) A magistrate who finds that the information is exhibited to him for an offence out of his jurisdiction, certainly cannot proceed to issue even his summons; and his conviction must shew that all the proceedings were within his jurisdiction.

Statement of magistrate's name and jurisdiction.

As regards the statement of the name and *exact authority of the magistrate*, although facts establishing a sufficient jurisdiction must unquestionably be shewn in a conviction, (*q*) yet it would probably be otherwise in an information; and it would suffice if it were in fact exhibited to the *proper* justice. (*r*)

After the statement in the information of the coming of the informer on a named day, and at a stated place, before a parti-

(*k*) *Ante*, 132 to 143.
(*l*) *Rex* v. *Smith*, 3 Maule & S. 133.
(*m*) *Rex* v. *Lovett*, 7 T. R. 152; Com. Dig. Action on Stat.
(*n*) 1 Lord Raym. 510; 2 Lord Raym. 1546.
(*o*) *Rex* v. *Picton*, 2 East, 196; *Rex* v. *Kent*, 2 Lord Raym. 1546.
(*p*) *Kite and Lane's case*, 1 B. & Cres. 101.
(*q*) 2 Salk. 471; 1 Stra. 261.
(*r*) *Semble*, the books in general confound the requisites of an information with those of a conviction.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

ticular justice, it is usual to allege that on, &c., at, &c., the offender did, &c., sometimes stating his particular situation, (as when the proceeding is against the occupier for pursuing game, even on his own land, when the game is reserved, under the 1 & 2 W. 4. c. 32. s. 12).

The name and description of offender.

The name or accurate description of the offender or offenders must be stated; for otherwise a conviction would not afford him any protection from another proceeding for the same cause. We have seen who may be joined. An information against A. B. *and Co.*, not having a corporate name, would be invalid; (s) but a particular statute, as the General Turnpike Act, 3 G. 4. c. 126, sometimes authorizes a summary proceeding against a party without naming him, if he have refused to disclose it; (t) and even in cases where the name is known, and must therefore be stated, there is no occasion to add any addition of place or degree; for the statute of Additions, 1 Hen. 5, only relates to proceedings to outlawry, and does not apply to summary proceedings. (u)

The time of committing the offence.

As respects the *time* of committing the injury or offence, it is certainly essential to name *some* day, the same as in indictments and declarations; (v) and this with professed precision. (w) It is also advisable, to avoid all discussion, to state the *real* day; and some justices have *erroneously* supposed that the witnesses must afterwards, on the hearing, positively fix upon some precise and single day, when they allege the offence was committed, nearly corresponding with the time laid in the information. But the *proof* need not correspond with the statement of the time; for even in an indictment for murder, or other capital offence, a variance as to the day, month, or even year, is immaterial; and it would be singular that more strictness should be required in case of an offence less than a misdemeanour than in a prosecution for a capital crime; (x) and laying the offence on the 20 June, omitting *of* June, does not afford any valid objection; (y) and when an information is exhibited in the same month as that in which an offence has been committed, the words "*last past*" will not necessarily be construed to denote

(s) *Rex* v. *Harrison*, 8 T. R. 508.

(t) 3 Geo. 4, c. 126, s. 132.

(u) *Rex* v. *Burnaby*, 2 Lord Raym. 900; 1 Salk. 181.

(v) *Rex* v. *Puller*, 1 Salk. 369; *Rex* v. *Cathered*, 2 Stra. 900; 14 East, 272.

(w) 1 Lord Raym. 509.

(x) *Rex* v. *Chandler*, 1 Salk. 378; 1 Lord Raym. 581; Carth. 502; and see as to *place*, *R.* v. *Woodward*, 1 Mood. Cr. C. 323, *post*.

(y) *R.* v. *Huggins*, 3 Car. & P. 602.

a month in a preceding year. (z) But if the offence be alleged to have been committed between two named days, that would exclude the proof of an offence committed before the first or after the last of those days. (a) As that mode of stating an offence is allowed in informations, it may be advisable, when the exact day is doubtful, to allege that it was committed on a certain day, without naming it, between the —— day of —— and the —— day of ——, taking care to state days sufficiently distant from each other to include the real day. (b) When a statute *recently* passed has enacted that if a party commit an offence after a named day, he shall be liable to a penalty, it has been usual to aver that the offence was committed after that day; but not so when the statute has been long enacted, and in no case is the allegation necessary. (c) It is usual also, when a particular statute limits the time within which the prosecution must be commenced, to aver that the offence was committed within that time, as "and within three "calendar months now last past;" but this also is unnecessary. (d)

The place of committing the offence.

Sometimes the nature of the offence requires *local description*, and then accuracy will be essential; and when the penalty or a part, is given to the poor of the parish where the offence was committed, then the parish where the offence was committed must be very accurately stated, according to the truth; (e) and if the statute require the offence to be prosecuted before justices *next* to the place where the offence was committed, then accuracy in the local description may be essential; (f) and it must be expressly averred that the precise place where the offence was committed was in the county where the justices have jurisdiction. (g) But in general the name of the parish or place is immaterial to be proved as alleged; and where there was no place of committing the offence charged in the information, as stated in the conviction, the Court held that the place was to be intended to have been laid where the information was made; (h) and even the statement of a fictitious parish in an indictment has been holden immaterial, although it be expressly

(z) *R.* v. *Crisp*, 7 East, 389.

(a) Hawk. B. 2, ch. 25, s. 82.

(b) *R.* v. *Chandler*, 1 Salk. 378; *R.* v. *Speed*, 1 Lord. Raym. 583; *R.* v. *Simpson*, Gilb. 282; Bunb. 223; id. 262.

(c) Gilb. Cases L. & E. 242; 1 Saund. 309, note 5.

(d) 2 East, 340; id. 362.

(e) *Clarke* v. *Taylor*, 2 Esp. R. 213. But if extra parochial, when not material, 2 Lord Raym. 1478; 6 T. R. 540.

(f) *R.* v. *Chandler*, 14 East, 267, *ante*, 155.

(g) *R.* v. *Edwards*, 1 East R. 278; *R.* v. *Chandler*, 14 East, 267; *R.* v. *Hazell*, 13 East, 139; 2 Lord Raym. 1220.

(h) *R.* v. *Swallow*, 8 T. R. 281

CHAP. IV. SUMMARY PROCEEDINGS, &c.

proved that there is no such parish in the county. (*i*) The offence must always be stated in the *body* of the information, and proved to have been committed in the *county* within which the information was laid, and the statement of the county merely in the margin will not suffice; (*k*) and this even in cases where a form of conviction is given, which does not expressly require the statement of place. (*l*) In general, even in cases where the precise place is immaterial to be proved as laid, yet it has been held necessary to state either a new place, or to repeat "then and there" to every fresh sentence or allegation, or the information is bad, and the conviction would be quashed. (*m*) But it suffices to repeat the town or parish *aforesaid*, without also adding in the *county* aforesaid. (*n*) It was held, that if a man standing in one parish or county shoot at game in another, he uses the gun in the district in which he stands. (*o*) There is no intendment, either in allegation or evidence, in favour of a place having been within the jurisdiction; and therefore, although it was proved that a *house* was within the proper county, and that a private still was found concealed in a *garden belonging to such house*, yet for want of express evidence that such garden also was within the jurisdiction, the conviction was quashed. (*p*)

Description of the offence itself.

The safer course, it has been said, is to describe the offence itself, either affirmatively or negatively, in the very words of the statute; (*q*) but a variation from the precise words of the statute is not fatal, if the words used are such as bring the case within the plain meaning of the act. (*r*) Besides the words of the act, there must also be *particularity* in regard to *time*, *place*, and such *other essential circumstances* as may be necessary for *certainty and precision;* for although the statute be general in its terms, yet the *information* and *evidence* must nevertheless frequently be *particular;* (*s*) and as a general rule, an information and conviction must be as certain as an indictment. (*t*)

The requisite particularity.

(*i*) *R.* v. *Woodward*, 1 Moody's Crown Cases, 323; but see *R.* v. *Jeffries*, 1 T. R. 241.

(*k*) 8 Mod. 309; 2 Lord Raym. 1220; 1 Saund. Rep. and notes.

(*l*) *R.* v. *Hazell*, 13 East, 136; *Kite and Lane's case*, 1 B. & C. 101.

(*m*) *R.* v. *Hazell*, 13 East, 139; and *R.* v. *Edwards*, 1 East, 278.

(*n*) *R.* v. *Burnaby*, 2 Lord Raym. 901.

(*o*) *R.* v. *Alsop*, 1 Show. 339.

(*p*) *R.* v. *Chandler*, 14 East, 267.

(*q*) *Cohen* v. *Morgan*, 6 Dow. & Ry. 8; Per Lord Holt, in 1 Lord Raym. 581, 583; 1 Salk. 378; *R.* v. *Marsh*, 2 Bar. & Cres. 717.

(*r*) Per Bayley, J. in *R.* v. *Ridgway*, 5 B. & Ald. 527; 1 D. & R. 123.

(*s*) In *R.* v. *Chapman*, Sayer, 203, a conviction in the words of the statute, "robbing an orchard," without saying of what, was holden, bad; and see *R.* v. *James Caldecott*, 458; *R.* v. *Jervis*, 1 Burr. 152; *R.* v. *Perrott*, 3 M. & S. 379.

(*t*) *R.* v. *Pain*, 5 Bar. & Cres. 251; 7 D. & Ry. 678. S. C.

Thus, although a statute enact that if any person "*rob an orchard*," he shall be subjected to a specified punishment, it will not suffice in an information to allege that the defendant, on, &c., at, &c. robbed a certain orchard, but it must be shewn what in particular he robbed, in order that the justice and Court may judge whether it was a robbery within the meaning of the statute; (*u*) and in an information against journeymen for entering into a *certain agreement* for the purpose of controlling a manufacturer, it has been considered that the agreement itself ought to be set forth, so that the Court may judge whether its terms contravened the statute; (*v*) but the authority of that decision has been questioned. (*w*) We have seen some instances of the requisite *certainty* as to *number.* (*x*) When the penalty or amount of damages to be awarded could depend on quantity or quality, then, in general, the number must be stated, or the information or conviction would be insufficient; (*y*) but where there is a *fixed penalty* for committing some illegal act, or even where a tenant has been guilty of a fraudulent removal, to prevent a landlord from distraining the goods of his tenant, it has been decided that then the number or description of goods so removed need not be stated. (*z*)

When an information or oath, merely in the words of the statute, will not suffice.

In all cases, when by the terms of a particular statute, the information itself is required to be *on oath;* or when in support of an information, the oath of a credible witness of the offence is required, before the magistrate can legally issue his *summons*, much less a *warrant*: (*a*) then it is incumbent on him to take care that such informer or deponent do state in such oath the particular facts *as they occurred*, and that he do not swear as it is termed by the card in the *very words* of the act; (*b*) and, unless facts are apparently truly sworn essential to constitute the offence complained of, the magistrate should not issue even his *summons*, and certainly not a *warrant*, upon *a general* information, however technically correct. (*b*)

Should be as extensive as the facts will warrant.

On the other hand, the information and oath should be as extensive in the statement of the offence, as the then supposed facts will warrant; for the informer cannot afterwards, on the

(*u*) *R.* v. *Chapman*, Sayer, 203; *R.* v. *Selwyn*, 2 Chit. R. 522, but see *R.* v. *Rabbits*, 6 Dowl. & R. 341, *infra*.

(*v*) *R.* v. *Neild*, 6 East, 417.

(*w*) Per Abbott, C. J. in *R.* v. *Ridgway*, 5 B. & Ald. 527.

(*x*) *Ante*, 145, and *supra*.

(*y*) Id. ibid.

(*z*) *R.* v. *Rabbits*, 6 Dowl. & Ry. 341. Sed *quære supra*, note (*u*).

(*a*) All the recent acts, 9 Geo. 4, c. 31, and 7 & 8 Geo. 4, c. 29, and ch. 30, and 1 & 2 W. 4, c. 32, require *such oath*.

(*b*) *Cohen* v. *Morgan*, 6 Dowl. & Ry. 8.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

hearing, give evidence of a larger or a different offence than that stated in the information. (c)

The information must charge an offence equal to that prohibited, either in the express words of the act, or substantially so.

The information also must charge the offence, either in the *precise terms* of the act, or in words which are *synonymous* or equivalent to the same offence; and therefore, whilst the statute 5 Ann, c. 14, was in force, an information charging that "the defendant *killed a hare*," instead of saying that he *used a greyhound to kill and destroy game*, the conviction thereupon was quashed; (d) or if a statute declare the offence to be killing hares or fish in an "*inclosed place*," the information must aver accordingly. (d) So where the then Smuggling Act, 45 Geo. 3, c. 121. s. 7, subjected any British subject to a penalty, when found on board a ship, *in a certain situation*, an informatian not describing the defendant accordingly, was holden invalid; (f) but the unnecessary *addition* of words, not altering the effect of the charge, will not prejudice. (g)

Information must be positive, &c.

An information also must be *positive*, (h) and not by way of *recital*; (k) nor be *argumentative*, (l) nor in the *alternative*, as that the defendant killed, *or* attempted to kill, or sold beer *or* ale; (m) and if it should be defective in either of these respects, the defendant might object on the hearing; or if the conviction should *continue* the defect, the same might be quashed; and though it has been supposed, that probably if the justice in the conviction should state that the defendant was only guilty of one precise act, the objection would be aided; (n) yet it has been decided, that an information on the 48 Geo. 3, c. 143, for selling beer *or* ale without an excise license was bad, and a conviction thereon, finding that the defendant sold ale only, was quashed. (o) If the particular statute contain either of the words, maliciously, *wilfully*, *knowingly*, *unlawfully*, &c., then the information, at least, if not the evidence and conviction, must aver and maintain, that the defendant with that motive, knowledge, or illegality, committed the act. (p)

Particular words in the statute descriptive of offence, when essential.

Averments negativing exemptions or qualifications.

If there be any *exemption*, *exception*, or *qualification*, in the

(c) *R.* v. *Wilson*, Mr. Justice Ashurst's paper books, and *post*, tit. Conviction.

(d) *R.* v. *Morgan*, 2 Chit. R. 563.

(e) *R.* v. *Sadler*, 2 Chit. R. 519; *R.* v. *Moore*, 2 Lord Raym. 791.

(f) *Ex parte Hawkins*, 2 B. & Cres. 31.

(g) *R.* v. *Ridgway*, 5 B. & Ald. 527.

(h) *R.* v. *Bradley*, 10 Mod. 155.

(k) 2 Stra. 900; 2 Lord Raym. 1363.

(l) 1 Salk. 373.

(m) *R.* v. *North*, 6 Dow. & Ry. 143; *R.* v. *Pain*, 5 Bar. & Cres. 251; 7 Dowl. & R. 678.

(n) *R.* v. *Sadler*, 2 Chit. R. 519.

(o) *R.* v. *North*, 6 Dowl. & R. 143; and see *R.* v. *Pain*, 5 Bar. & C. 251; and 7 Dowl. & R. 678, S. C.

(p) *R.* v. *Jukes*, 8 T. R. 536; *R.* v. *Ridgway*, 5 B. & Ald. 527; when need not, *R.* v. *Marsh*, 2 B. & Cres. 720.

enacting clause which imposes the penalty, or in a *proviso therein*, or even in any *other* clause that ought *to be read as part thereof*, although printed in a distinct section; then it is necessary, after stating the offence or act complained of, to aver or state that the offender was not within such exception or qualification; but when the exemption or qualification comes in a ***subsequent*** clause ***not referred to*** in the enacting or penal clause, then no such averment is necessary, and the defendant must bring himself within the exception, as a cross and distinct ground of defence. (*q*) But it has been lately held, that the mere placing the proviso in the same section of the printed act does not make it necessary to notice it in an information or conviction, or in pleading, unless it is also incorporated in or referred to in the *enacting sentence;* as by the words "except "as hereinafter mentioned," for statutes are not divided into sections, upon the rolls of Parliament. (*r*) When necessary to negative exceptions at all, it is necessary to negative each distinctly in an *information*, and not in a general sweeping allegation; although it would be otherwise in a *declaration* upon the same act, and for the same penalty. (*s*) The most frequent instances of convictions having been quashed for this defect, were cases under the now repealed Game Act, for the penalty incurred, by using a gun to kill game, not being qualified, in which it was held necessary to negative all the qualification in the enacting clause; (*t*) although it was considered otherwise as to exemptions, introduced in a *subsequent* enactment, of which the defendant must take advantage by bringing himself within the exception; and the prosecutor need not adduce any negative evidence. (*u*) Numerous other instances, however, have frequently occurred (*v*); and under the 12th section of the recent Game Act, 1 & 2 W. 4, c. 32, an information for the 40*s*. penalty against *an occupier* of land, for pursuing game in his own land must, it is apprehended, aver, in the terms of the section, that he committed the offence *without the authority of the lessor*, &c., (*w*) although the same act requires the defendant to prove the affirmative of any defence, (*x*) and which seems to be now established as a *general rule;* so that the now requiring an in-

(*q*) 1 T. R. 144; 6 T. R. 559; *R.* v. *Jukes*, 8 T. R. 542; *R.* v. *Jervis*, 1 East, 646, 7; *R.* v. *Matters*, 1 B. & Ald. 362; 2 Chitty's R. 582; 6 B. & C. 430; 3 B. & C. 189.

(*r*) 3 B. & C. 189; and see observations in *Vulasour* v. *Ormrod*, 6 B. & Cres. 130; as to *declarations* on Statutes, 1 Chitty on Pleadings, 255, 6, 404, 5.

(*s*) 1 T. R. 144; 1 Lev. 26; 1 East, 639; 2 Comyn. Rep. 524.

(*t*) *R.* v. *Wheatman*, Dougl. 346.

(*u*) *R.* v. *Hall*, 1 T. R. 320. *R.* v. *Turner*, 5 M. & S. 206.

(*v*) *R.* v. *Jukes*, 8 T. R. 542.

(*w*) *Ante*, 142, 146.

(*x*) Id. 1 sect. 42.

formation to negative in detail all the exceptions, when the prosecutor need not adduce any evidence in support of his allegation, is not perhaps of any practical utility; excepting that it may suggest to the defendant and to the magistrate some legal grounds of defence; (y) and one of the greatest lawyers (z) that ever presided in the Court of King's Bench frequently expressed his wish that justices would always, when an information is preferred, interrogate the informer and his witnesses before he issued his summons or warrant, whether there was not some circumstance, stating each, which might under the act constitute a defence, and not to proceed until he was satisfied that at least it was most probable there was not a *primâ facie* defence; by which means, he observed, much trouble and many frivolous informations would be avoided.

Conclusion, contra formam statuti.

When an information is for an act or omission that did not constitute an offence at common law, then, after stating the commission or omission, the information should aver that the offence was committed *contrary to the statute in that case made and provided;* (a) and the rules affecting indictments (b) and declarations (c) in this respect would apply and must be consulted. If the allegation, when necessary, has been omitted in a declaration, the defect is fatal, even *after verdict;* (d) and though the omission in an *indictment* or *information* for a *felony* or *misdemeanor* is now aided after verdict or outlawry or confession or default, by the 7 G. 4, c. 64, s. 20, yet that act does not extend to *offences* punishable by summary proceedings before justices; and, though in one case, Lord Kenyon observed, that magistrates ought not to be entangled in greater forms and ceremonies than the Superior Courts; (e) yet on the other hand, at least *as much form is essential* in summary proceedings as in indictments; (f) and Abbott, C. J., speaking of the certainty required in convictions, observed, that he knew of no authority which held that a conviction should not have as much *certainty* as an indictment. (g) And the general form of conviction given in the statute 3 Geo. 4, c. 23, supposes that the *information* has concluded "*contra statuti,*"

(y) *R.* v. *Turner*, 5 M. & S. 206; *R.* v. *Marsh*, 2 B. & Cres. 717; and *post*, evidence.

(z) Lord Tenterden.

(a) Information and Conviction, Burn J. 26th edit. 3 Vol. 351; tit. Indictment.

(b) Indictments, 1 Chit. Crim. L. 290.

(c) Declarations; see the rules collected, 1 Chitty on Pleading, 5th edit. 405 to 407.

(d) 3 B. & Cres. 186; 2 East, 333.

(e) *R.* v. *Swallow*, 8 T. R. 286; but see 2 T. R. 222; 8 T. R. 542.

(f) *Ante*, 164, note (t), per Lord Kenyon, in *R.* v. *Swallow*, 8 T. R. 286.

(g) In *R.* v. *Pain*, 5 Bar. & C. 251; 7 Dowl. & R. 678, S. C.

and as that form of conclusion when unnecessary, would be rejected as surplusage, the safer course in cases of the least doubt, is to conclude "against the form of the statutes" (in the plural), which can never prejudice. (*h*) If the allegation be omitted when necessary, the defendant might object to the information on the hearing, though after conviction defects in form therein are aided. (*i*) It is not however necessary to state any legal conclusion, as that, "thereby and by force of the statute," &c., the offender forfeited the penalty. (*k*)

It has been supposed not to be necessary, in an information for an assault and battery, to conclude, contrary to the statute; (*l*) but it will be at least prudent to introduce the allegation; for though the injury was illegal at common law, yet the statute gives the peculiar remedy with certain qualifications, and the penalty is to be appropriated in aid of the county rate, and therefore the statute should be referred to; and the proceedings for injuries in the nature of larceny, (*m*) and for small malicious injuries to personal or real property, (*n*) do so conclude; and as the penalties recoverable under the recent Game Act, 1 & 2 W. 4, c. 32, are entirely given by that act, the information must charge that the offences were committed against it.

"*Contra Pacem.*"

The reason why the omission of the words "*contra pacem,*" in an information, is immaterial, has been assigned to be, because these summary proceedings are not by the King, and he can have no fine upon them for the breach of the peace; (*o*) but as part of the technical description of any injury amounting to a trespass, it is at least proper to introduce those words.

Several counts for different offences, or varying descriptions.

An information may certainly contain *several counts,* either for different injuries or offences committed on the same or different days, and so as to subject the party to several penalties; or different counts, varying the statement of the same injury, may be introduced; (*p*) and the information may be valid, for such offences as have been well laid and proved, although the same may fail as to any defective or unproved count. (*q*)

(*h*) Cowp. 683.; 5 T. R. 162; 2 Leach, 585.

(*i*) 3 Geo. 4, c. 23, s. 3.

(*k*) 3 Bar. & Cres. 189; and see 2 East, 338; 7 East, 616.

(*l*) Burn J. 26th edit. Assault, 1 Vol. 274, 5.

(*m*) Burn J., 26th edit. Larceny, 3 Vol. 599.

(*n*) Id. p. 740, 742.

(*o*) 1 Salk. 372; *R.* v. *Chandler*, 1 Lord Raym. 581.

(*p*) *R.* v. *Swallow*, 8 T. R. 284; 1 Saund. Rep.

(*q*) 2 Hawk. chap. 26 and 19; but see *R.* v. *Patchet*, 5 East, 344; *R.* v. *Catherall*, 2 Stra. 900; 1 Smith R. 547; Cowp. 728.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

Prayer that the offender be summoned.

The information in general concludes with a *prayer* that the offender be summoned to answer the complaint, either before one or two justices, as the law may require; but this part of the form seems wholly unnecessary, for it would be the duty of the magistrate, upon the mere statement of the offence, in a case free from doubt, to issue his summons without any formal prayer that he do so.

Defects in an information, when and how aided.

In stating the requisites of an information, we have necessarily occasionally considered what objections are or not material, and how they may be aided by the defendant waiving any objection in respect of form, and allowing the merits to be proceeded in. The proper and only time to object to mere defects *in form*, is in the first instance, and at all events before conviction; for the 3 Geo. 4. c. 23. s. 3, enacts, "that in all cases "where it appears by the conviction that the defendant has "*appeared* and *pleaded*, and *the merits* have been tried, and "that the defendant has not appealed against the said convic- "tion, where an appeal is allowed, or if appealed against the "conviction has been affirmed, such conviction shall not after- "wards be set aside or vacated in consequence of *any defect of* "*form whatever*, but the construction shall be such a fair and "liberal construction as shall be agreeable to the justice of the "case." This enactment only applies *after* conviction, and after the defendant has appeared, and *not before*, nor where the defendant does not attend in pursuance of the summons; and even where he has appeared, care must be observed to keep in view the distinction between what is strictly considered matter of *form*, and what is matter of *substance*, and some of the decisions on which have already been mentioned. (*r*)

Form of informations in general.

Having in the preceding pages considered the requisites of an information, (*s*) and referred to one general form of information as regards its commencement and conclusion, (*t*) it may be here useful in practice to give the forms to be observed under the particularly enumerated statutes most frequently proceeded upon, *viz.*, the 9 Geo. 4, c. 31, as to common assaults and batteries; the 7 & 8 Geo. 4, c. 29, as to petty stealings not indictable; the 7 & 8 Geo. 4, c. 30, as to small, wilful, or malicious injuries, not indictable; and the 1 & 2 W. 4, c. 32, for the protection of game. (*u*)

(*r*) *R.* v. *Jukes*, 8 T. R. 536, *ante*, 157.
(*s*) *Ante*, 155 to 170.
(*t*) 156, note (*l*).
(*u*) See the long note in next page.

We have seen that sometimes the statute giving the summary proceeding, allows a *complaint* of a party aggrieved, or other person *without oath;* but all the four modern acts which we have particularly considered, appear to require that the justice shall

Sixthly, Oath or deposition after information and before summons.

Complaint or information for a common assault and battery, on 9 G. 4, c. 31. s. 27.

(u) Hertfordshire, to wit: { The information and complaint of *A. B.*, of the parish of ——, in the county of ——, yeoman, a credible witness in this behalf, *made upon his oath* (*), before *E. F.*, Esquire, one of the justices of our Lord the King, assigned to keep the peace of our said Lord the King, in and for the said county of Hertford, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, on the —— day of ——, in the —— year of the reign of our said Lord the now King, and according to the statute in that case made and provided, who saith, that (†) *C. D.*, of the said parish of ——, in the said county, yeoman, within three calendar months last past, and on the —— day of ——, A. D. —— [(†) with force and arms and with a certain horsewhip, and with a stick, and with his fist, at the said parish, and within the said county, unlawfully made an assault upon him the said *A. B.*, then being in his own dwelling-house there, and did then and there strike and beat the said *A. B.* several times with the said horsewhip, and stick, and his fist, and did then and there collar and shake, and pull about the said *A. B.*, and knock him down violently, to and upon the floor and ground there, and also then and there kicked the said *A. B.*, and gave and struck him the said *A. B.* divers severe and violent blows, and beat, bruised, and wounded him, and then and there otherewise greatly illtreated the said *A. B.*, and thereby the said *A. B.* then and there became and was ill, and so remained and continued for three days, and thereby the said *A. B.* incurred and sustained an expence of 2*l.* in endeavouring to be cured of his said illness, so occasioned as aforesaid, and against the peace of our said lord the King] and contrary to the form of the statute in such case made and provided, whereby he the said *C. D.* hath forfeited for his said offence the sum of 5*l.* And thereupon the said *A. B.* prays that the said *C. D.* may be summoned to answer the premises before two justices of the peace in and for the county aforesaid according to the statute aforesaid.

A. B.

Sworn before me, *E. F.*, a justice, &c.

Information on 7 & 8 G. 4, c. 29. s. 40, for breaking a dead fence with intent to steal the same.

[Same as the first form, excepting in the statement of the offence, which must depend on the facts; the description of stealing a dead fence under sect. 40, may be thus: "That *C. D.*, of, &c. labourer, within three calendar months last past, "and on —— did unlawfully break and throw down with intent to steal the same, a "part, that is to say, one yard in thickness and three yards in length, of a certain "dead fence of the same *A. B.*, then standing within the parish of ——, and in "the said county of ——, and then being the property, and in the possession of "the said *A. B.*, and then being upon and belonging to a certain close of the said "*A. B.* there and of the value of five shillings, contrary to the statute in that case "made and provided, and whereby the said *C. D.* then and there forfeited the said "value of the said dead fence, and a sum not exceeding five pounds. And there-"upon, &c."]

Information on 7 & 8 G. 4, c. 30. s. 24, for a wilful or malicious injury.

[Same as first, to the brackets, and then as follows: "That *C. D.*, of ——, la-"bourer, on, &c. did wilfully, maliciously, and unlawfully, and not acting under a "fair or reasonable supposition that he had a right to do the same act, did commit "damage and injury to a certain live dog of the said *A. B.*, of the value of five "pounds, then in the parish of ——, and within the said county of ——, by then "and there wilfully, maliciously, and unlawfully, and without any reasonable "cause, shooting and firing off a certain gun, then and there loaden with gun-"powder and leaden shot, at and against the said dog, and thereby, and with the "same shot, then and there greatly lacerated, wounded, and injured the same dog, "contrary to the statute in that case made and provided, and whereby the said "*C. D.* then and there forfeited and became liable to pay the sum of 5*l.*, being a "reasonable compensation for the said damage and injury so committed. And "thereupon, &c."]

(*) 9 Geo. 4, c. 31, s. 33, appears to require *an oath* before a justice should issue *his* summons. But such oath may be made by a *third* person, or by the complainant; see form of oath by a *third* person, *post*, 173, note (*b*).

(†) The common assault and battery is to be stated according to *the facts*, and shewing any consequential damage. The form of *declarations* in Chitty on Pleadings, 2 Vol. 850 to 858, or of Indictments, in 3 Chitty's Crim. L. 821 to 827, may be pursued in particular cases.

CHAP. IV.
SUMMARY PROCEEDINGS, &c.

not issue his summons or warrant without the previous "*oath* "*of some credible person,*" of the offence charged in the information having been committed. (*w*) This was essential, for otherwise parties would be perpetually harrassed by hasty and unfounded summonses on the behalf of litigious persons, without any check, or punishment, or redress, for the loss of time and trouble incurred in attending before justices on frivolous and unsustainable charges. And for the same reason, magistrates should, in the first instance, interrogate the deponent as to all the circumstances, and really be of opinion that the story imputes a clear offence, and is to be *credited,* before he issues his summons. It will frequently occur, that the *party aggrieved* by an injury committed against the recent acts, or some other statute, may be wholly ignorant of the circumstances under which the injury was committed; and, therefore, it is essential that some *third* person who witnessed the transaction should be enabled to make the necessary oath, upon which to found the subsequent proceedings. The terms of such oath ought not to be prepared or drawn up, or even taken, until *after* the witness has been sworn, because what he states ought to be under the influence and sanction of an oath; and the oath must not be subsequently applied to a previously prepared narrative, antecedently reduced into writing. (*x*) In framing such oath, care must be observed that it expressly aver that the offence was committed at the *same time,* and under the same circumstances as those charged in the information, and so as to shew that the particular prohibited offence has been committed. Thus, where an information had been exhibited against a party for having *then* concealed brewing vessels in his possession; and in a deposition subsequently made, the deponent swore that the party *now hath* in his possession, &c., it was held, that the time did

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Information on Game Act, 1 & 2 W. 4, c. 32. s. 30, for a trespass in pursuit of game. (*v*)

[Commencement the same as in the first form in this note, to the brackets, and then as follows: "That *C. D.*, of, &c. labourer, within three calendar months "last past, and on, &c. did unlawfully commit a trespass, by entering into and "being in the day time, upon certain land then and there being a close in the occupation of *A. B.*, in the parish of ——, and in a certain part thereof within the "said county of ——, in search for and pursuit of game, snipes, and conies there, "contrary to the statute in such case made and provided, whereby the said *C. D.* "then and therefore forfeited for his said offence the sum of two pounds. And "thereupon, &c."]

(*v*) As to the generality in the description of land, see the decision of Taunton, J. in *R.* v. *Mellor*, 2 Dowl. Prac. Rep. 173, and Legal Observer, 6 Vol. 378, and *post*, title Commitment. An information on the 12th section of the act, against an *occupier*, must carefully bring the case within the terms of that section.

(*w*) *Ante*, 9 Geo. 4. c. 31, s. 33; 7 & 8 Geo. 4, c. 29, s. 65; id. chap. 30, s. 30; and 1 & 2 W. 4, c. 32, s. 41.

(*x*) *R.* v. *Kiddy*, 4 Dowl. & Ry. 734; and Mag. C. 364

CHAP. IV. SUMMARY PROCEEDINGS, &c.

not necessarily import the same, or refer to the same offence as that charged in the information; and the conviction was therefore quashed, because, as observed by Lord Holt, a conviction must be certain, and not taken by intendment. (z) It will be remembered, that whenever a statute requires a preliminary oath in support of the charge before the justice issues a summons, he should require the deponent to state the facts *exactly as they occurred*, and not merely in the words of the statute, and which if *bonâ fide* stated, will protect the informer or witness so swearing, from any liability for the subsequent proceedings, or for any imprisonment or search that may take place under a warrant founded on such oath. (*a*) The deposition should, in substance, charge the offence with as much certainty, and with the same negations of any exemptions in the enacting clause, as an information, and may, subject to these observations, be in the subscribed form, when the proceeding is for an assault and battery. (*b*) And when the oath is upon either of the other statutes, the substance of it should comprise the allegations in the preceding informations, though according to the genuine statement of the witness; (*c*) and the justice would do well to interrogate the deponent, whether the facts do not fall within some exemption in the enacting, or even the subsequent clauses. If a justice should cause the party to be imprisoned upon his warrant without a *sufficient oath* of an offence having been committed, he would be liable to an action of trespass. (*d*)

Seventhly, The duty of a justice to receive an information, and issue process thereon.

Upon a clear charge of an offence before one or more justices, and when there can be no reasonable ground for doubting the jurisdiction or the propriety of exercising it, a justice *ought* to receive the information and issue his summons or warrant when proper, and cause the charge to be heard; and if he should refuse, he might, in a very clear case, be compelled to act by *mandamus* from the Court of King's Bench, (*e*) and by some

(z) 1 Lord Raym. 509.

(*a*) *Post*, and *Cohen* v. *Morgan*, 6 Dowl. & Ry. 8; In *Elsee* v. *Smith*, 2 Chit. Rep. the party *maliciously* stated false facts and grounds.

Form of oath to obtain a summons.

(*b*) *E. F.*, of ——, labourer, maketh oath and saith, that on, &c. at ——, in the parish of ——, and in a part thereof within the county of ——, he this deponent was present, and did see *C. D.*, of ——, labourer, then and there and within the said county [" assault and beat *A. B.*, " by then and there giving him several " blows and strokes with a whip and " with his fists, and by which the said " *A. B.* was, in the judgment and belief of this deponent, severely bruised " and injured."] *E. F.*
Sworn before me this —— day of ——, A. D. ——, at ——, in the county of ——.
Y. Z., a justice, &c.

(*c*) See forms of Informations, *ante*, 171, 2, in note.

(*d*) *Morgan* v. *Hughes*, 2 Term Rep., and *post*, Liability of Justices.

(*e*) *R.* v. *Wrottesley*, 1 B. & Adolph. 648; *ante*, 1 Vol. 795 to 798; *R.* v. *Broderip*, 5 B. & Cres. 239; 7 D. & Ry. 861; and see 1 Stra. 413; id. 530; *R.* v. *Benn*, 6 T. R. 198,

CHAP. IV. SUMMARY PROCEEDINGS, &c.

particular enactments he would incur a penalty for the neglect.(*e*) But where justices have *reasonable ground for doubting* their jurisdiction, the Court will not compel them to do any act which might subject them to an action; (*f*) and in a late case, (*g*) Abbott, C. J., said, "if the conviction itself is not valid in law, "for not having been *founded upon oath*, and the magistrate "issues his warrant to apprehend the party, he will be liable to "an action of trespass; and we cannot compel him to put him-"self in a situation of so much responsibility. If a justice of "the peace criminally forbears to discharge his duty, he is "amenable for his conduct by information, as for a public of-"fence; but that is a very different thing from commanding "him to do that which may subject him to an action." The mere circumstance, however, of a defendant insisting that the justice has no jurisdiction, is not sufficient to excuse the justice in not proceeding, (*h*) and the Court of King's Bench will issue a *mandamus*, unless it appear very questionable whether the justice has jurisdiction, especially if there be no other course of proceeding; for otherwise the law would remain unadministered.(*i*) Sometimes the statute "authorizes and empowers;" in other instances, the words are also "required" or enjoined, (*k*) and in the latter cases the justices are at least bound to proceed to *a hearing*, however they may decide. (*l*) Where under the law of the Customs there has been a seizure of goods, and the justices refuse to proceed in consequence of the legality of such seizure being questionable, the owner may by *mandamus* compel them to proceed, so as to enable him to reclaim his property. (*m*)

Eighthly, The summons.

Whether particularly directed or not, still according to natural justice, a magistrate, unless in cases where he has power and ought to issue a warrant in the first instance, should issue his *summons*, requiring the defendant to appear before one or two justices, according to the nature of the charge; (*n*) and whatever

(*e*) Skinner's Rep. 61.

(*f*) *Ante*, 1 vol. 796; *R.* v. *Broderip*, 5 Bar. & Cres. 239; 7 Dowl. & Ry. 861; *R.* v. *Justices of Buckinghamshire*, 1 B. & Cres. 485; 2 D. & R. 689; 1 Dowl. & Ry. Mag. Cases, 369; *R.* v. *Robinson*, 2 Smith R. 274.

(*g*) *R.* v. *Broderip*, *supra*.

(*h*) *R.* v. *Wrottesley*, 1 B. & Adolph. 648.

(*i*) *R.* v. *Robinson*, 2 Smith R. 274.

(*k*) 50 Geo. 3, c. 41, s. 21.

(*l*) See all the cases in preceding notes, and *ante*, 1 vol. 796

(*m*) *R.* v. *Todd*, 1 Stra. 530.

(*n*) Per Parker, C.J. in *R.* v. *Simpson*, 10 Mod. 379; *R.* v. *Benn*, 6 T. R. 198; and see *R.* v. *Allington*, 2 Stra. 678, 630; *R.* v. *Venables*, 2 Lord Raym. 1406; *R.* v. *Constable*, 7 Dowl. & R. 633; 3 Mag. Cas. S. C. *R.* v. *Columins*, 8 Dowl. & R. 344. So payment of a poor rate cannot be enforced but after a *demand* and a *formal summons* of a justice; *R.* v. *Benn*, 6 T. R. 198.

may have been the practice under the Customs or Excise laws, a justice always ought *himself*, to sign such summons after he has heard the charge, and not suffer his clerk to sign the same, or to issue any ready prepared summons. (*o*) The summons should fully state the charge as in the information, in order that the defendant may know what he has to answer, and may prepare his defence accordingly. But under the game laws it was usual not to set out the negations of all the exceptions fully, as was necessary in the information, but merely to say "he the "said defendant not being qualified by the laws of this realm "so to do." (*p*) It is, however, the safest course to copy the whole charge as in the information; and where a particular form of summons is prescribed by the statute, it must be observed. (*q*) The summons may be directed to the party accused himself; or, unless otherwise prescribed, there may be a *precept* to the constable, ordering him to summon the party; but the former is preferable. It must name a time (*r*) and place (*s*) of appearance, and usually, with analogy to other proceedings, should fix a certain hour of the day, and not between several named hours, as between eleven and one; (*t*) but nevertheless the party must, if the justice or justices be not ready to proceed to the hearing at the appointed hour, wait during all reasonable hours of the same day. (*u*) If the summons be dated of a day prior to that when the information was laid, and the party do not appear, any subsequent proceedings would be void. (*v*) So if it be to appear on an impossible day, as on Tuesday the 17th April when the 17th April fell on a Friday, no proceedings could be had thereon, unless the party appear and defend, (*w*) or perhaps it should appear that he was not misled. (*x*) The time appointed must always allow sufficient opportunity between the service of the summons and the time of appearance, to enable the party to prepare his defence and for his journey; and the justice should in this respect take care to avoid any supposition of improper hurry, or he may incur the censure of the Court of King's

(*o*) *R.* v. *Stevenson*, 2 East, 365; and see *R.* v. *Constable*, 7 Dowl. & Ry. 663, as to the necessity for regularity and actual interference of the justice himself in all the proceedings.

(*p*) *R.* v. *James*, Caldecot, 458; Burn's J. tit. Game.

(*q*) *R.* v. *Croke*, Cowp. 30.

(*r*) *R.* v. *Dyer*, 1 Salk. 181; *R.* v. *Picton*, 2 East, 196.

(*s*) *R.* v. *Simpson*, 1 Stra. 46; *R.* v. *Johnson*, 1 Stra. 261.

(*t*) The practice is so; and see cases as to notice of inquiry, Sayer R. 181; Barnes, 296, 302; 2 Stra. 1142; 3 Bos. & P. 1; 1 Chitty's R. 11, 615.

(*u*) 1 Douglas Rep. 198; Tidd, 9th ed. 579.

(*v*) *R.* v. *Kent*, 2 Lord Raym. 1546; but aided probably by appearance and defence, in *R.* v. *Johnson*, 1 Stra. 261.

(*w*) *R.* v. *Dyer*, 1 Salk. 181; cited in *R.* v. *Hall*, 6 Dowl. & Ry. 84; *R.* v. *Stone*, 1 East, 649.

(*x*) 3 Bos. & Pul. 1; 1 Chitty's R. 10; but see id. 615.

Bench, if not be subject to a criminal information. The precise time will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man ought not to be required *omissis omnibus aliis negotiis* instantly to answer a charge of a supposed offence necessarily less than an indictable misdemeanor, on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore in general several days should intervene between the time of summons and hearing. In the superior Courts, in general, at least eight days' notice of inquiry and of trial are essential for the preparation of the defence; and a charge of an inferior offence may require full as much time, as there has not upon such a charge been any antecedent notice of the proceeding, as in actions; and as these charges are frequently made by parties under sudden excitement, it is better to allow them time to cool; and no inconvenience can result from delay, for if it be expected that the alleged offender will abscond, he may, in many cases, be apprehended in the first instance. Where the summons was to appear on the *same day*, the Court held it extremely unreasonable, as the party's attendance might be impossible, or he might not be able to collect his witnesses on so short a warning; but the Court held the objection aided by the defendant's appearance and entering into his defence without praying further time. (*y*) It is a general rule in these cases, as well as in proceedings in the superior Courts, that appearance cures the defect and uncertainty either as to time or place; (*z*) and the safer and only prudent course, is for a defendant, when served too late, nevertheless to attend before the justice, and state his objection to the time, and require an adjournment to another day, and which the justice will be bound to make. (*a*) But should he not appear, the justice must inquire into the time and circumstances of the service of the summons, and unless it appear to have been quite sufficient, should of his own accord adjourn the hearing and issue a fresh summons, reciting the former. If a justice should wilfully proceed to convict without a previous sufficient summons, or without enlarging the time when required, he may be prosecuted by information or indictment for the misdemeanor. (*b*) The form of the summons may be as

(*y*) *R.* v. *Johnson*, 1 Stra. 261; *R.* v. *Stone*, 1 East, 464.

(*z*) Id. ibid.

(*a*) *Ante*, 175.

(*b*) *R.* v. *Venables*, 2 Lord Raym. 1407; *R.* v. *Simpson*, 1 Stra. 46; and see observations in *R.* v. *Stone*, 1 East, 642, on *R.* v. *Heber*, 2 Barn. 101.

in the note ; (c) or a precept may be issued to a constable, and who is thereupon to summon the party. (d)

The service of the summons.

It will be obvious that the summons must also be *served* in a reasonable time, before that appointed for the hearing. In ordinary cases, as that of a notice to quit, it suffices that it may be either delivered to the party himself, or may be left at his residence ; and upon proof of the latter, it will at least be *presumed*, that he has actually received it and in due time. (e) But as a party upon a conviction may incur a penalty, and even imprisonment, no such presumption is allowed ; and unless the particular statute authorise a service by leaving the summons at the party's residence, it must be proved on the hearing, that he *actually received* the summons in due time to enable him to attend. (f) Some of the acts, we have seen, expressly authorize the

Form of summons to the defendant, on a complaint information, and after oath.

(c) The form of summons under the 9 Geo. 4, c. 31 ; 7 & 8 Geo. 4, c. 29, and c. 30 ; and 1 & 2 W. 4, c. 32 ; and in general, may be as follows. It will be observed, that those acts require the *oath* of a credible witness before a summons can be issued, though the *complaint* need not be on oath.

To *C. D.*, of ———.

Hertfordshire to wit : } Whereas complaint and information in writing hath been made before me *E. F.*, Esquire, one of His Majesty's justices of the peace for the said county of Hertford, by *A. B.*, of ———, that you, &c. [*here state the offence charged as in the information*] contrary to the statute in that case made and provided : And whereas you have also been charged, on the oath of a credible witness before me as such justice, with the said offence ; these are therefore to require you personally to appear before me [*or* before two of his Majesty's justices of the peace in and for the said county] at the house called ———, in ———, in the said county, on ———, the ——— day of ——— next, at the hour of ———, in the ——— noon, to answer to the said complaint and information, and to be further dealt with according to law (*). Herein fail you not at your peril. Given under my hand and seal (†) this ——— day of ———, A. D. 1834.

E. F. (L. S.)

(d) See form of Precept, Paley on Convictions, 505.

(e) *Ante*, 1 Vol. 483 ; and *Doe dem. Neville* v. *Dunbar*, 1 Mood. & Mal. 10.

(f) Per Parke, C. J. 10 Mod. 345 ; *R.* v. *Chandler*, 14 East, 268 ; *R.* v. *Colamins*, 8 Dowl. & R. 344 ; and *R.* v. *Hall*, 6 Dowl. & R. 84 ; id. Mag. Cas. 3 Vol. 19.

In *Rex* v. *Hall*, it was held that the record of a conviction *by default* upon the now repealed Game Act, 5 Anne, chap. 14, must shew that the defendant has been *personally* summoned to appear to the information ; and Abbott, C. J., said, " without giving any opinion, that a *personal service* in all cases is absolutely necessary, it is sufficient to say, that in this case, no sufficient substantial personal service appears to have taken place, and therefore the conviction must be quashed. Bayley, J. It is consistent with every analogy, that a party shall not be concluded, without personal service of the process which is to affect his liberty. It is laid down in Burn, Boscowen, Nares, and other text books, see Burn, J., tit. Conviction ; Bosew. 60 ; Paley, on Convictions, by Dowling, 26 ; that personal service of the summons is necessary, unless where it is expressly dispensed with by statute. Of that opinion was Lord C. J. Parker ; *Rex* v. *Simpson*, 10 Mod. 345. In that case, there was in fact a personal service ; but the main point decided was, that a defendant who

* The form in Paley's Convictions here adds, " and the said *A. B.* the informer " is also ordered to be then and there " present to make good the said com- " plaint and information ;" but those words are unnecessary.

(†) The sealing, although usual, is not essential in a *summons*, though otherwise in a warrant.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

summons to be left at the dwelling-house, and others the service on any inmate there, provided the purport of the summons be explained to them. (*g*) But in the former case, it must appear that the service was on the wife, or an immediate servant of the party charged. (*h*) And even in these cases, if the party do not appear, and it be doubtful whether he actually received the summons in time, the magistrate ought to adjourn the hearing, and cause a fresh summons to be served.

Of the warrant to apprehend offender.

By the common law, no party could be arrested or imprisoned for an offence, not indictable before he has been indicted or convicted; but it being found that *transient* offenders (to use the language of the modern highway and turnpike acts,) for want of a power to apprehend them, eluded justice; modern acts, we have seen, have introduced in numerous instances, powers to apprehend, even without warrant; (*i*) and we have seen that the recent acts, 9 Geo. 4, c. 31, s. 33; 7 & 8 Geo. 4, c. 29, s. 65, and c. 30, s. 30, contain express powers for a justice in certain cases if *he shall so think fit*, after oath of the offence, to issue his warrant to apprehend for petty offences in the first instance, and even without any previous summons. (*k*) In the exercise of this discretionary power, no justice should cause a party to be imprisoned, unless he be satisfied by the *oath* of a credible witness, that the offender is about to abscond, (*l*) but should issue a summons in the first instance. (*m*) At all events, before any warrant or imprisonment, there must have been a *formal charge* of an offence within the particular act, or the magistrate will be subject to an action, even for a

did not choose to appear after being duly summoned, might be convicted in his absence. If the defendant appears and makes a defence, it must be taken that he was duly summoned; but if the conviction was by default, it must be clearly shown on the face of the record, that he had been *personally served*, and had an opportunity of being heard. Here it could not be stated that the defendant was personally served, because what is recited is repugnant to the fact. In *Reg.* v. *Dyer*, 1 Salk. 181, it was stated that the defendant was summoned to appear on *Tuesday*, the 17th of April, &c. In fact the 17th of April fell on a *Friday*, and it being objected that the time of the summons being impossible, it was the same as if there had been no summons, the Court quashed the conviction on this ground, saying "there could be no such day, and therefore he could not appear thereupon; and, when one day is set forth, his appearance on another cannot be intended." This is an authority in principle governing the present case. I think this conviction must be quashed, for not showing that the defendant was personally summoned. *Rex* v. *Hall*, 6 Dowl. & Ry. 84.

(*g*) *Ante*, 134, 137, 141, 143.

(*h*) *R.* v. *Clement*, 4 B. & Ald. 218.

(*i*) *Ante*, 1 Vol. 617 to 633.

(*k*) And see *Bane* v. *Methuen*, 2 Bing. 67; 7 J. B. Moore, S. C.

(*l*) See observations of Lord Tenterden, in *R.* v. *Birnie*, 1 Mood. & M. 160; 5 Car. & P. 206, S. C.; and of Tindal, C. J. as to transient offenders, in *Hanway* v. *Boultbee*, 2 Mood. & M. 15; and 4 Car. & Pa. 350.

(*m*) *R.* v. *Martyr*, 13 East, 55.

slight and temporary imprisonment; (*n*) and even in cases where imprisonment before conviction would be legal, care must be observed expeditiously to bring the party before the justice, (*o*) and that the justice himself proceed *speedily* to a final hearing, and that he do not detain the party an unreasonable time under colour of re-examination. (*p*) The form of a warrant to apprehend in the first instance, may be as in the note (*q*). It will be observed, that the recent statutes require an *oath* before any summons or warrant should be issued; and at common law in general, before a man can legally be deprived of his liberty, it is a rule that there must have been *oath* of his having committed an offence, and otherwise only a summons should issue. (*r*)

Besides the recent acts we have more particularly considered, there were others which contain similar powers of apprehension in certain cases; (*s*) and when the statute requires the justice to cause *the offender to be brought before him*, it has been considered that this implies an authority to use compulsory process. (*t*) But unless an express power be given to apprehend before conviction, a justice cannot issue his warrant to imprison in default of appearance to his summons, and can only proceed *ex parte* to a hearing of the informer's evidence, and dismiss the information, or acquit, according to the weight of evidence. (*u*)

Of a search warrant.

It is a general maxim, that every Englishman's house is his castle, and that no outer door can be broken for the purpose of

(*n*) *R.* v. *Birnie and others*, 1 Mood. & M. 160; *Bridgett* v. *Coyney*, 1 Man. & Ry. Mag. Cases, 1; 1 Man. & Ry. Rep. 211, S. C.; *Morgan* v. *Hughes*, 2 T. R. 225.

(*o*) *Wright* v. *Court*, 4 Bar. & Cres. 596; 6 Dow. & Ry. 622, S. C.; *Davis* v. *Capper*, 10 Bar. & Cres. 28.

(*p*) Id. ibid.

(*q*) Hertfordshire. } To the Constable of ——, and all other peace officers of the said county.

Form of warrant to apprehend, to answer a summary complaint or information.

Forasmuch as *C. D.* of ——, in the county aforesaid, labourer, hath this day been charged before me *G. H.* Esq. one of His Majesty's Justices of the Peace, of and for the said county, on the oath of a credible witness, that he the said *C. D.* on, &c., at, &c., in the said county, did, &c., [*here state the offence as stated in the oath or deposition, ante*, 165, 171, 2, 3.] contrary to the statute in such case made and provided; and it is further sworn before me by a credible witness, that he verily believes that the said *C. D.* will abscond or unlawfully absent himself from and out of the said county, in order to avoid conviction and punishment for his said offence, unless he be forthwith apprehended. These are therefore in pursuance and by virtue of the statute in that case made and provided, to command you in His Majesty's name forthwith to apprehend and bring before me, or some other of His Majesty's Justices of the Peace in and for the said county, the body of the said *C. D.* to answer unto the said charge, and to be further dealt with according to law. Herein fail you not. Given under my hand and seal, the —— day of ——, A. D. 1834.

G. H. (L. S.)

(*r*) 2 Barnard, 34, 77, 101; *Morgan* v. *Hughes*, 2 T. R. 225.

(*s*) 42 Geo. 3, c. 119, s. 4; 47 Geo. 3, sess. 2, c. 78, s. 146; 50 Geo. 3, c. 41, s. 25.

(*t*) 1 Paley Conv. 24, on 19 Geo. 2, c. 21, s. 4.

(*u*) *R.* v. *Simpson*, 10 Mod. 341, 378; 1 Stra. 44; *Ditton's case*, 2 Salk. 490.

apprehending him, except in cases of treason, felony, or breach of the peace, or contempt of the House of Lords or Commons; and though if an outer door be open, a person may if he be certain that his goods are therein, and illegally placed there by the occupier, lawfully enter to take the same away, yet he does so at his peril, and is subject to an action of trespass if it should turn out that his goods were not there; (u) and until the recent enactment, a search warrant could only be obtained upon an oath that a *felony indictable*, or *misdemeanor*, had been committed, and shewing reasonable suspicion that the stolen goods were concealed in a particular house; (v) and if such a warrant were maliciously obtained without reasonable cause, the party obtaining and acting under it, is subject to an action on the case; (w) and if the warrant were illegal in form, the magistrate is liable also to an action of trespass. (x) But now we have seen, that the 7 & 8 Geo. 4, c. 29, s. 63, enacts, "That if "any credible witness shall prove upon oath before a Justice of "the Peace, a reasonable cause to suspect that any person has "in his possession, or on his premises, any property whatever, "on or with respect to any *such offence* (*i. e.* any illegal *steal-"ing* of personalty or part of the realty, not constituting "felony, or indictable misdemeanor, but punishable summarily) "shall have been committed, the justice may grant a warrant "to search for such property, as in the case of stolen goods." The course of proceedings in the case of a search warrant, where goods have been *feloniously* stolen, will in general apply. (y)

To obtain a search warrant under this act, there must, by the terms of the act, be an *oath* of a *reasonable cause to suspect* that a named person has in his possession or on his premises at, &c., according to the facts, certain named property stolen. The oath need not swear absolutely to any stealing, but only to suspicion, and *stating the circumstances*. (z) The warrant may be framed in substance from the forms in Burn's Justice, (a) and should in terms in general only authorize a search in the *day time*, (b) though there may be exceptions. (c) The entry into a dwelling-house of another, upon the imputation of his having there concealed stolen property, is so strong a measure,

(u) *Ante*, 1 Vol. 641 to 646.

(v) Burn's Justice, title Search Warrant; *Elsee* v. *Smith*, 2 Chit. R. 304; *Hensworth* v. *Fowkes*, 4 B. & Adolph. 449.

(w) *Elsee* v. *Smith*, 2 Chitty's R. 304.

(x) Id. ibid.

(y) Burn J. tit. Search Warrant.

(z) *Elsee* v. *Smith*, 2 Chit. R. 304.

(a) Burn's Justice, tit. Search Warrant.

(b) 2 Hale, 150.

(c) Barlow's Justice, title Search Warrant.

and so injurious to character, that upon charges in these cases of *small offences*, a very strong case of *guilt* should be established before a justice should issue a warrant of this description.

Of securing evidence and attendance of witnesses.

Before the hearing, the informer and the defendant must respectively consider the means of obtaining the appearance of witnesses and the production of documents. But it is questionable whether Justices of the Peace *out of sessions*, have in the absence of *express* authority given by the particular act, any power of summoning witnesses before them for or against a summary proceeding; at least they have no power of *enforcing* attendance. (*d*) But such a power has been given, though only in *particular cases*, by modern acts; and sometimes penalties (as in the game act, 1 & 2 W. 4, c. 32, s. 40,) of even 5*l*. have been imposed upon witnesses in case of non-attendance. (*e*) But no such power is given by 9 Geo. 4, c. 31, or 7 & 8 Geo. 4, c. 29, or c. 30. The want of such a power renders the jurisdiction very imperfect; for a complainant, for want of it, may be unable to proceed, and a defendant may be unjustly convicted, because he may not have been able to enforce the attendance of a material witness, and who may have been kept back by the complainant. It would be *unaccountable* that the legislature should omit giving the power in the three *principal* and *general* acts, so very extensive in the enactments, and yet anxiously give it, and impose a penalty, in the statute 1 & 2 W. 4, c. 32, s. 40, were it not that the latter act relates *to game*, a property, which in the estimation of some persons, is superior to all others in ideal value. To supply this manifest defect in other cases, a magistrate would be justified in dismissing the complaint, in case a material witness should neglect to attend.

In the case of an examination upon oath of the owner of demolished buildings, or his servant, in order to found proceedings against the hundred, it has been held to be no objection that the examination was brought ready prepared to the magistrate, if he do not require any further communication. (*f*) But in general, the statement of any *material* evidence should not be drawn up until the parties are before the justice. We shall consider the application of this rule hereafter, when ex-

(*d*) Paley Conv. 33; Burn J. tit. Evidence; 2 Vol. 82.

(*e*) And see 7 Geo. 4, c. 33, s. 20.

(*f*) *Lowe* v. *Broxtowe*, 3 Bar. & Adolph. 550; *ante*, 1 Vol. 580, 1.

amining the conduct to be observed when preparing for the trial of an action.

The proper course, as well for the complainant as the defendant, is, as soon as practicable after the service of the summons, to apply to the justice who issued the summons, for his summons to each material witness; and as the issuing the same would be in *furtherance* of an authorized proceeding, and at least an innocent act, even when not expressly authorized, a justice should, when essential to justice, grant it *valeat quantum;* and when an express power has been given to summon witnesses, as in the Game Act, 1 & 2 W. 4, c. 32, s. 40, one or two justices are to *sign* the summons, and in case of neglect to attend at the time and place appointed, and no sufficient excuse being proved, or if he should refuse to answer, he forfeits not exceeding 5*l.*, recoverable also by summary proceedings. The form of summons may be as subscribed. (*g*) The competence of witnesses, and their evidence, will be presently considered.

The hearing, and proceedings before one or two justices, &c.

At the appointed hour, the complainant or informer, with his witnesses, and the party charged, with his evidence, are to attend before the justice or justices, and wait, as we have seen, a reasonable time until he be ready. (*h*) But a magistrate who is not as punctual as his other *official* duties will admit, is unfit for his station. The hearing and proceedings before the drawing up the formal conviction, may be considered with reference to the following several points, viz., the jurisdiction of the justices, and their number and character; the non-appearance of the defendant, and proof of the summons; the adjournment by the justices; the right to appear and be assisted by counsel, attorney, or friend; the reading of the information; the objections to the information; the mode of conducting the hearing;

Form of summons to a witness.

(*g*) County of Hertford. } Whereas information hath been made by *A. B.*, of ——, before me *G. H.*, Esquire, one of His Majesty's justices of the peace for the said county, that *C. D.*, on, &c. at, &c. did, &c. [*here set out the complaint and information verbatim*] contrary to the statute in that case made and provided, and the said *C. D.* hath also been charged with the said offence by and upon the oath of a credible witness: And whereas, I am further informed that you *L. M.*, of ——, in the said county, yeoman, are a material witness to be examined according to law, concerning the said supposed offence: These are therefore to require you the said *L. M.* personally to be and appear before me [*or* before two of His Majesty's justices of the peace for the said county], at the house of ——, at ——, in the said county, on ——, the —— day of —— next, at the hour of ——, in the —— noon of the same day, to testify your knowledge of and concerning the matters alleged in and relating to the said complaint and information. Herein fail you not. Given under my hand and seal, the —— day of ——, A. D. 1834.

G. H. (L. S.)

(*h*) *Ante*, 175.

the taking down of the evidence; the competency of witnesses and admissibility of evidence; the evidence on the part of the complainant in particular; and then the defence and evidence of the defendant; and the justices' right to adjourn their final determination.

Jurisdiction and number of justices.

The jurisdiction of one or more justices, has already been considered, in enquiring before whom an *information* may be laid; and we have seen that a general jurisdiction has been given to *one* justice to receive the information, take the oath of an offence having been committed, issue the summons and warrant to apprehend or to search, although the ultimate *hearing* of the charge must be before *two justices.* (*i*) Cases of *common assault and battery*, must by the 9 Geo. 4, c. 31, be *determined* by *two* justices; in cases of *petty stealings*, not constituting indictable larceny at common law, and also of wilful or malicious injuries to property *not* indictable, the 7 & 8 Geo. 4, c. 29, and c. 30, give jurisdiction to *one* justice to hear and determine, excepting in some cases of prosecution for *second* or *subsequent offences*, when as the penalty or punishment is more considerable, frequently the adjudication of *two* justices is required by the express terms of those acts. (*k*) These are only a few instances; in each case that may occur, the *particular statute* must be consulted.

But even in cases where jurisdiction is given to *one* justice to convict, it would be an unwise exercise of power to act separately, unless upon the very clearest and most indisputable charge; and it is most judicious, especially in the country, in order to avoid local prejudices, always to obtain the hearing and conviction by *two* justices acting *together*. Derogatory instances of irregularity, if not of gross injustice, so detrimental to the respect really due in general to magistrates, would probably be thus avoided. *Two* justices acting together would rarely venture to be guilty of those excesses and abuses of power, which in modern time are sometimes exhibited by *one* magistrate when acting singly. We are here, however, to confine our attention *to the law.*

We have seen that the hearing must be before the *proper* justices, as directed by the statute on which the proceeding is founded; and where an act directs, that a party charged shall

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(*i*) *Ante*, 154.

(*k*) *Ante*, 152 to 155, and 175.

be taken before justices residing *next to the place* where the party shall be taken or arrested, the conviction must show that they so resided, or otherwise specify the particular circumstance under which the convicting justice had jurisdiction. (*l*)

Of the non-attendance of the defendant, and proof of the due service of the summons.

If at the appointed time and place the defendant do not appear, then the justice or justices should upon oath examine the constable or person to whom the summons was delivered to be served, respecting the time, place, and circumstances of the service, and before any proceeding *ex parte*, should be well satisfied that there has been a regular service, according to the requisites of the particular statute, or an actual personal service upon the defendant himself, a reasonable time before the appointed hour; and if there should be any doubt in this respect, or any apprehension that mistake or accident has occasioned the non-attendance, then the prudent course will be to adjourn, and appoint another day for the hearing, and to issue a fresh summons accordingly, apprising the complainant and his witnesses of the adjournment.

But if the magistrate be satisfied that there was a sufficient service, and that the defendant wilfully neglects to appear, he may then proceed *ex parte*, taking care to observe with even greater care, all regularity in the proceedings, as presently suggested, especially as regards the taking down of the evidence; and it will be as well to caution the informer, that if his information should turn out defective, then as the defendant has not appeared, the defect will not be aided by the 3 Geo. 4, c. 23, and the whole proceeding be futile. At all events, the justice must observe the same course of proceeding as if the defendant had appeared. (*m*)

Of confessions.

If the defendant appear and confess the charge without qualification, he thereby dispenses with the necessity for the complainant adducing any evidence; and this is considered as equivalent to the strongest proof, and suffices even in cases where a particular statute may have required "the oath of one or two credible witnesses;" and it has been even held, that proof of a confession made to another person, and not before the justice, suffices; but the better opinion is, that the confession must be made in open Court, and before the convicting magistrate. (*n*)

(*l*) *Ex parte Kale*, 10 Bar. & C. 101; 2 Dowl. & R. 212; *ante*, 152 to 155.

(*m*) *R.* v. *Warnford*, 5 Dowl. & Ry. 489; 10 Mod. 381; Paley Conv. 26.

(*n*) *Semble*, 2 East's R. 131; Foster's Crown L. 240.

A confession, however, will not (unless perhaps under the 3 Geo. 4, c. 23) aid a substantial defect in the information. (*o*)

Adjournments.

Of Adjournments.—If the party charged appear in person, or by attorney or friend, and state adequate excuse for not being then ready to proceed to investigate the charge, the justice must exercise a liberal discretion, and not prejudicially press immediate proceedings, and he should *adjourn* the hearing, (*p*) taking care first to ascertain whether the particular statute requires a conviction within a limited time nearly elapsed. (*q*)

Reading the information to the defendant, and his objections thereupon.

Reading the Information to the Defendant.—The defendant has a right in the first instance to have the complaint deliberately read to him, when the statute required it to be, or it really has been *in writing;* and if not, then at least the *substance* of the charge must be stated. (*r*)

If the information upon which the summons was founded was defective, the party charged with the offence may, upon the *hearing*, in the first instance, object to its validity; and if the objection be well founded, the magistrate should immediately dismiss the information; and if not, he would proceed at his peril: and if a justice should in his conviction, without the defendant's express concurrence, recite a supposed valid information differing from that which had really been exhibited, and upon which the party had been summoned, the Court of King's Bench would compel him to return the *real information*, upon a proper notice of motion, *mandamus* and *certiorari*, and the magistrate would be at least censured; (*s*) and certainly any conviction for an offence not charged in the information would be invalid. (*t*)

The defendant has a right to insist that the hearing shall be entirely confined to the terms of the charge stated in the original information or summons; and if the latter be defective, he has a right to insist on a fresh summons, stating the real and also a sufficient charge. (*u*) Upon a valid objection, the informer might abandon the charge and prefer one more final; and therefore when the objection is of substance and would not be aided by a conviction under the 3 Geo. 4, c. 23, then the prudent

(*o*) *R.* v. *Settle*, 1 Burr. 605.
(*p*) *R.* v. *Stone*, 1 East, 469.
(*q*) *R.* v. *Folley*, 3 East, 467; *R.* v. *Bellamy*, 1 B. & Cres. 500; *R.* v. *Barratt*, 1 Salk. 363.
(*r*) 2 T. R. 23.
(*s*) *Semble*, *R.* v. *Peace*, 9 East, 358.
(*t*) *Rogers* v. *Jones*, 3 B. & Cres. 409; 5 Dowl. & Ry. 268; *R.* v. *Soper*, 3 B. & Cres. 857; 5 Dowl. & R. 669.
(*u*) Id. ibid.

course may be for the defendant not to disclose his objection until it is too late to commence a fresh proceeding.

Right to appear by counsel or attorney, and have their *private* assistance.

Attendance of Counsel, Attorney, or Friend.—Upon preliminary examinations upon charges of ***indictable felonies or misdemeanors***, it might impede the course of justice to allow counsel or an attorney to attend and make objections; and therefore though their assistance is sometimes allowed, it is ***not of right;*** and though formerly doubted, it is now settled, that the defendant has in all cases of summary proceedings which are to be heard and *decided* by one or more justices, a *perfect legal right* to have the *attendance* and *private assistance* of counsel or an attorney.(*v*) In a subsequent case, the Court of King's Bench limited the right (without *permission* of the justice) to mere attendance and *private* assistance or advice, *and taking notes;* but held that neither the informer nor the defendant has a right to have the assistance of counsel or an attorney *to interfere as an advocate for either party*, either in *examining or cross-examining witnesses*, or in *arguing technical or other objections*, at the risk of embarrassing the justices, though each or a friend may take notes.(*w*) Whether this restriction, so

(*v*) *Daubeny* v. *Cooper*, 10 Bar. & Cres. 237, A. D. 1829, K. B. In *Collier* v. *Hicks*, 7 January, 1831, held in K. B. that an attorney has a right to be present, and advise and assist his client; but that a justice may refuse to permit him to act as a counsel; *i. e.* making speeches; see a sensible note in Dowling's edition of Paley on Convictions; and see cases of felony and other indictable charges; *R.* v. *Coleridge*, 1 B. & C. 37; and 2 Dowl. & R. 86, S. C.

(*w*) See *Collier* v. *Hicks and others*, 2 B. & Adolph. 663. The following is a MS. report of that case, containing the principal points. This was an action by an attorney at Cheltenham against Sir W. Hicks, and another magistrate of that town, and two of their officers, for expelling the plaintiff from their justice-room. The case came on upon a demurrer to two special pleas of justification. The facts were these:—In December, 1829, an information was laid before the magistrates at Cheltenham by one Latham, against the proprietors of a stage-coach, for not having a plate with a number upon the coach. On the hearing of the information, the plaintiff, Mr. Collier, appeared, and proposed to act as an advocate, in taking notes and conducting the proceedings on the part of the informer, but the magistrates refused to let him act in that character, and on his persisting in his attempt to do so, he was removed from the justice-room. The question now for the decision of the Court was, whether the plaintiff had a right to be present at the hearing of the information before the magistrates, as the attorney of the informer, and to take notes of the evidence.

Mr. *Godson*, for the plaintiff, relied principally on the case of "*Daubeny* v. *Cooper*," which decided that an attorney had a right to be present on the hearing of an information before a magistrate, as one of the public. He argued that the magistrates were acting, on this occasion, in a judicial capacity, as they were bound to hear and determine, and that their room, therefore, was an open court, where any one had a right to be present to hear what was passing, and could not legally be expelled, unless for interrupting the proceedings, or otherwise conducting himself improperly. The question was, whether magistrates could prevent not only attorneys, but counsel, or any other person, from acting as advocates on the hearing of an information under a penal statute. He contended that they could not. Any one had a right to be present as an attorney or advocate, or to take notes of what was passing.

Mr. *Justice*, for the defendants, was stopped by

crippling the assistance of professional men, in cases where sometimes very intricate questions of law requiring legal discussion and decision should continue, is a subject fit for the Legislature to consider, but is foreign to our present limited inquiry.

Right of third person uninterested to be present, but not to take notes.

It has been recently holden, that the proceedings against a party in a summary manner, under the 5 Ann, c. 14, for keeping and using a gun to destroy game, was of a *judicial nature,* at which all persons have a *primâ facie* right to be present; and therefore where a magistrate had, without any specific reason, caused a party who claimed a right to be present to be removed from a justice-room where such a proceeding was going on, it was held that he was liable to an action of trespass. (*x*) But the justices have a right so far to regulate their proceedings as to prohibit *the taking of notes of the evidence,* excepting on the part of the *informer* or the *defendant;* and if persisted in after notice, they may cause the party to be turned out of the room where the hearing is had. (*y*)

Lord Tenterden, who said the Court was of opinion that the pleas amounted to a justification in law, and therefore the judgment must be for the defendants.

Their Lordships then proceeded to deliver their opinions *seriatim* at considerable length. The substance of their judgment was, that the magistrates had a discretion in common with other courts of justice, in regulating their proceedings or determining who should be heard before them in the character of an advocate. The pleadings in this case did not raise the question as to the right of any person merely to take notes, but the plaintiff put it on the ground that he had a right to act as an advocate *in arguing or expounding the law, and examining or cross-examining witnesses;* and it had been *very properly* said, that if the magistrates could exclude an attorney, they had also the power to prevent a barrister or any one of the public from acting as an advocate. The Court was of opinion that the magistrates had that power, although frequently, in the exercise of their discretion, they allowed members of either branch of the profession to conduct cases where the accuser or the defendant required legal assistance. The Superior Courts of Westminster-hall had the power, and were bound, according to ancient usage, not to allow any persons to plead before them but barristers who were members of one of the Inns of Court; and in the Court of Common Pleas, none but barristers who had attained the dignity of serjeant were allowed to practise. It might be proper that either party should have the *advice and assistance* of a counsel or attorney in some cases; but it did not follow that it was desirable in all cases, for it must necessarily lead to expense, as the other party must be provided with the same assistance to be on equal terms with his adversary. It might also be doubted whether such a practice was favorable to the due administration of justice; for members of either branch of the profession, in discussions before magistrates, might urge *technical objections,* quite beside the justice of the case, which must have the effect of *embarrassing* persons not accustomed to such subtleties. In the case of "*Daubeny* v. *Cooper,*" and other cases, it was decided that all the King's subjects had a right to be present in an open court, so that there was room, and they conducted themselves with decorum; but those cases did not bear upon the present question, which was, whether magistrates had the power to decide who should appear before them as advocates; and the Court being of opinion that the magistrates had that power, the assault in excluding the plaintiff from the police-office was justified.—Judgment for the defendants.

(*x*) *Daubeny* v. *Cooper,* 10 B. & Cres. 237.

(*y*) *Collier* v. *Hicks,* 2 B. & Adolp. 663; and see as to coroners, *Garnett* v. *Ferrand,* 6 Bar. & Cres. 611.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

The evidence and witnesses.

In general, the particular act creating the offence or making it punishable by summary proceeding, contains some express directions about the witnesses and evidence; as that the party aggrieved shall be competent to be a witness in support of the charge, but then that he shall not receive more than the costs of the proceeding; (z) or that inhabitants of the parish or district, although to be remotely benefited in an almost imperceptible degree by the penalty being applicable in aid of the county rate. When the statute is silent, the admissibility of the evidence will be governed by *general principles* and rules, the statement of which would be beyond the limits of this work. As a *general* rule, however, it is to be kept in view, that whenever the *complainant or informer* would derive any *direct* benefit from a conviction, his interest precludes him from giving evidence in support of the proceeding, (a) unless it be expressly otherwise directed; and this is one reason why it has been decided that convictions should state the names of the witnesses, so that it may appear that the informer was not one of them. (b) But the small advantage to a witness as the *inhabitant of a parish*, to whom a penalty is given, does not now constitute any objection to his evidence; (c) and all the late acts, we have seen, render the inhabitant of a county admissible as a witness, though the penalty is to be paid in aid of the county rate. (d)

Oath of witness.

The *same oath* should be administered to each witness as on the trial of an action; and it is established that in support of a summary charge all the evidence must be *on oath* (e) duly administered, and in the presence and hearing of the defendant, if he appear; and if the justice proceed otherwise, he will be liable to a criminal information. (f)

It is clear that a justice of the peace has not jurisdiction to commit a person for contemptuously *refusing to take* an oath and *give evidence* touching a charge of an offence not indictable, if even he could do so upon a charge of riot; and where a party was committed by a justice "for refusing to give evidence before him touching a certain riot and disturbance," without showing that there had been a *person charged* before the justices, and that the witness was apprised of the existence of such charge, with respect to which he was required to be examined

(z) 7 & 8 G. 4, c. 29. s. 66; id. ch. 30. s. 29; 1 & 2 W. 4, c. 32.

(a) *R.* v. *Gobbold*, Gilb. Cases, 111; *R.* v. *Drake*, 2 Show. 476.

(b) *R.* v. *Gobbold*, Gilb. 111; *Rex* v. *Drake*, 2 Show. 476.

(c) 27 Geo. 3, c. 29; *Rex* v. *Davis*, 6 T. R. 177.

(d) 9 G. 4, c. 31; 7 & 8 Geo. 4, c. 29; id. ch. 30; and 1 & 2 W. 4, c. 32.

(e) *R.* v. *Corder*, 4 Burr. 2279.

(f) *R.* v. *Vissont*, 2 Burr. 1163; *R.* v. *Constable*, 7 Dowl. & Ry. 663; *R.* v. *Crowther*, 1 Term R. 125.

as a witness, it was held that the warrant of commitment was no justification of the magistrate in an action of trespass. (*h*)

When the conviction states, as it should do, the names of the witnesses, and that they were sworn before the justice, it will be inferred that they were duly sworn. (*i*)

A magistrate cannot be required to hear evidence which ought not to affect his determination. (*k*) But if he should incorrectly refuse to hear a competent witness for the defendant, his subsequent conviction may be removed by *certiorari*, and quashed. (*l*)

Mode of examination, &c.

The examination of witnesses, as indeed all the proceedings, should be conducted as nearly as practicable the same as in the superior Courts; and the rule there observed that *leading questions* shall not be put to a witness, so as to suggest favourable and probably incorrect answers, so accords with justice, that it should be observed before magistrates with the utmost strictness. Justices, however, should be particularly cautious not to be led from the *full* investigation of truth by too strict an adherence to the rules of evidence, with which they may have become informed by a legal education or particular study, at least when probably the observance of those rules would prevent them from attaining full information upon every subject; the more especially as those rules have of late been much qualified, as will be found in the subsequent chapter upon evidence. Thus it has been a supposed rule, that a party cannot contradict his own witness; and yet it has been lately decided, that if a witness gave evidence against the interest of the party who called him, such party may now nevertheless bring other witnesses, not indeed merely to *discredit him generally*, but to contradict him on the fact he has deposed, if it be material to the matter under investigation, though not so if it be merely collateral. (*m*) The same decision would authorize an informer or defendant to call successive witnesses to establish a fact, although a witness previously called by him had unexpectedly sworn the contrary. (*m*)

Mode in which the evidence must be taken down.

However irksome it may be, it is nevertheless *the duty* of magistrates, as well at common law as under the 3 Geo. 4, c. 23, upon all summary proceedings, whether for penalties incurred under the preceding acts or for any other penalty, or in any case where the proceeding may terminate in a conviction, to cause his clerk to take down the evidence *verbatim* in the *language of the witnesses*, not perhaps *all* the exact words, but the

(*h*) *Cropper* v. *Horton*, 4 Dowl. & Ry. Mag. Cases, 42.

(*i*) *R.* v. *Selway*, 2 Chitty's R. 522; *R.* v. *Picton*, 2 East, 195; *R.* v. *Glossop*, 4 B. & Ald. 616.

(*k*) *R.* v. *Minshul*, 2 Nev. & Man. Rep. 277.

(*l*) *R.* v. ——, 2 Chitty's R. 137.

(*m*) *Friedland* v. *London Assurance Company*, 4 B. & Adolph. 193.

whole of the *very words* that *are material,* and these not in the terms of the statute, but in the natural and actual expressions of each witness; (*m*) and the difficulty of so doing is no excuse for the omission. (*n*) It is recommended that the questions and answers be taken down precisely in the words and tense in which they are uttered, and that in cases of importance the evidence be immediately afterwards read over by the magistrate to the witness, and he be asked whether he has any thing to add or explain or qualify.

It has repeatedly been held, that justices should not allow depositions to be framed in the words of a statute under which the party is charged or committed, but as nearly as may be in the very words used by the witness; (*o*) and it is very irregular to take down the examination of a witness before he has been sworn, and afterwards to swear him to the truth of the statement; for the testimony at the very time it is given should be under the influence of the oath, and in the presence of the defendant, who may put questions to the witness altering the effect of his first statement. (*p*)

When the statute upon which the proceeding is founded does not prescribe another form of conviction, the general act, 3 Geo. 4, c. 23, applies, and then *expressly* requires the justice to state in the conviction "*the evidence, and as nearly as possible in the words used by the witness, and if more than one witness be examined, then the evidence given by each;*" and if the magistrate should neglect to frame his conviction accordingly, he may be compelled to comply by *mandamus*; (*q*) so that the proper course is for the justice to take down all the questions as well as the answers of the witnesses, in the very words used by them, and in the form that was adopted before commissioners of bankrupt. (*r*) And if a statute state that if a party be convicted upon the oath of a credible witness, he shall be punished in a prescribed manner, it is not sufficient for the conviction to state that the party was convicted of the offence, but it must *expressly state* that he was so convicted "on the oath of a *credible* witness." (*s*)

In general, the evidence must state the facts upon which the conviction is afterwards founded, and not merely the result; and

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(*m*) *R.* v. *Marsh*, 2 B. & Cres. 717; and 4 Dowl. & R. 260, S. C.

(*n*) Id. ibid.

(*o*) *Ante*, 165, 172, 3; *Miles* v. *Gollett*, 2 Man. & Ry. Mag. Cas. 262; *In re Rix*, 2 Dowl. & R. Mag. Cases. 251; *Cohen* v. *Morgan*, 6 Dowl. & R. 9.

(*p*) *R.* v. *Kiddy*, 4 Dowl. & Ry. 734; *R.* v. *Hall*, 1 T. R. 320; 2 Burr. 1163.

(*q*) *R.* v. *Marsh*, 2 B. & Cres. 717; 4 D. & R. 264, S. C.; and *In matter Rix*, id. 352; *R.* v. *Warnford*, 5 Dowl. & Ry. 489.

(*r*) See also *ante*, 172, 3.

(*s*) *Ex parte Aldridge*, 2 B. & Cres. 600; 4 Dowl. & Ry. 83, S. C.

therefore where a conviction on 45 Geo. 3, c. 121, s. 7, for carrying and conveying foreign brandy in half ankers, merely alleged to be "then and there liable to forfeiture," the said offence being committed against the provisions of the acts for the prevention of smuggling, this was held insufficient, for not showing the *particular grounds* of forfeiture; (*t*) and if a justice perversely and wilfully state the evidence in terms different in substance from that which was really given, he may be proceeded against by criminal information. (*u*)

The circumstance of the evidence varying in time or place from the information, we have seen, will not in general be material; and if in other respects it suffice, the justice should convict. (*v*)

The defence.

In the case of a *criminal* charge, it has been laid down that if a prisoner be brought before a magistrate, *his statement* of the facts ought not to be taken till the evidence against him has been gone through, and he should be then asked if he has any thing to say in answer to the charge, (*w*) and be cautioned that if he make any statement, it may be used against him, and that he must not expect any favour if he confess; (*x*) and Mr. Baron Garrow censured the practice of taking a statement from a prisoner, who should only be asked if he wish to say any thing in answer to the charge, when he had heard all that the witnesses in support of it had to say against him; but at the same time a magistrate need not *dissuade* him against confessing. (*y*) Perhaps these suggestions should also be observed in cases even of summary proceedings.

Evidence in support of defence.

With respect to the *defendant's evidence*, although we have seen that sometimes the *information* must negative that the defendant was protected or privileged by any exemption in the enacting clause, yet it has frequently been decided that the informer need not adduce any negative evidence; (*z*) and the late *Game* Act, 1 & 2 W. 4, c. 32, expressly enacts that the defendant shall prove a licence or exemption, &c. (*a*)

Defence under *bonâ fide* claim of right.

Independently of a denial of the facts charged at *common law*, and also expressly so under the recent acts, if the defendant

(*t*) *Ex parte Smith*, 3 D. & Ry. 461.
(*u*) *R.* v. *Pearce*, 9 East, R. 358.
(*v*) *Ante*, 162, 3; Bunb. 223, 262.
(*w*) *R.* v. *Fagg*, 2 Man. & Ry. Mag. Cases, 517.
(*x*) *R.* v. *Green*, 5 Car. & Pa. 312.
(*y*) See note (*w*) *supra*.
(*z*) *R.* v. *Turner*, 5 M. & S. 206; *R.* v. *Neville*, 1 B. & Adolph. 489.
(*a*) Sect. 42.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

make it appear, by cross-examination of the complainant's witnesses or by his own, that there was a *bonâ fide* claim of right, in asserting which the act was committed, then a justice or justices ought not to proceed, but should dismiss the complaint and leave the complainant to try the question in an action. (c) But the claim must not be merely *colourable*, but made under circumstances inducing at least a reasonable ground for supposing that it may be established; (d) and cases of this nature are, as we have seen, provided for by the three recent acts. (e)

Postponing the decision of the justices, and presence of all the justices together at the time of deciding.

Although there is not, it is believed, any express decision on the subject, it should seem that after the evidence on both sides has been closed, a justice or justices may take time to consider of his decision. (*f*) But then if two justices must convict, they should be present together when they do resolve upon the conviction, so that the parties may have the benefit of their compared, considered, and discussed judgments and decision; and it will be proper for the justices to give the complainant and the defendant reasonable notice of the intended time and place when the justices will decide, so that they may be present if they should think fit, and hear their verbal judgment, and receive a copy of their conviction if they should so decide.

In deciding, they are the sole judges of the weight of the evidence; and when the conviction is set out, if upon the face of their conviction, there be the least evidence that upon the trial of an action might have been left to a jury, then however slight, the Court of King's Bench will not interfere with their conviction, though perhaps they themselves might have drawn a different conclusion; as where upon an information under the then game laws, it was merely proved that the defendant walked across a field out of a footpath, as if in pursuit of game, or levelled his gun at game; (g) and on the other hand, if a magistrate should dismiss a charge after hearing evidence that might have justified a conviction, the Court also will refuse to interfere; (h) for only the justices are to judge of the degree of credit to be extended to each witness, and are not to be influenced alone by the exact words that may have been sworn. (i) The charge being of a criminal nature, all the rules relating to

(c) *Kinnersley* v. *Orpe*, Dougl. 500; *Hunt* v. *Andrews*, 3 Bar. & Ald. 341.
(d) Id. ibid.
(e) 7 & 8 Geo. 4, c. 29; id. ch. 30; and 1 & 2 W. 4, c. 32.
(*f*) *Semble*, Lord Raym. 1514; 1 Salk. 352; 1 East, 486.
(g) *R.* v. *Davis*, 6 T. R. 178; *R.* v. *Reason*, 6 T. R. 376; *R.* v. *Smith*, 8 Term R. 590; *R.* v. *Ridgway*, 5 B. & Ald. 127; 1 Dowl. & R. 132; Paley Conv. 53.
(h) Id. ibid.
(i) Id. ibid.

such imputations apply, and if there be the least doubt in the mind of the justice, the defendant ought to have the benefit, and be acquitted.

Of amicable adjustments and compromises, by the intervention of justices.

It is principally at this stage of summary proceedings, though it may be before, that by the recommendation of the hearing justice or justices, *amicable adjustments* or *compromises* take place; and the effecting of these is one of the most enviable departments of a country gentleman, invested with the office of a magistrate, so preferable to that of the character of a *committing* or a *convicting* justice. We sometimes see the calendar crowded with a detail of numerous commitments by a particular justice, who plumes himself on his *activity* in sending to trial numerous prisoners, who are as frequently acquitted; and although previously only suspicious characters, have during the imprisonment become confirmed felons. A justice of this description will seldom be a *pacificator* amongst neighbours, but will hastily, without examination, as in a recent instance, commit or convict without scarcely any enquiry. (*i*) Under the recent acts which, as affording remedies for small *private* injuries, are now principally under our consideration, a justice has express power, even *after* conviction of the specified petty injuries, "to "discharge the offender from his conviction, upon his making "such satisfaction to the party aggrieved for damages and "costs, or either of them, as shall be ascertained by the jus-"tice;" and this, although the penalty on conviction would have been applicable in aid of the county rate; (*k*) and independently of express enactment, informations for offences of a *private* nature not amounting to felony, nor to indictable misdemeanor, may, it should seem, be compromised by leave of the justices before whom the charge is preferred.

The 18 Eliz. c. 5, s. 4, as to the *offence of compounding*, only applies to the superior Courts, and not to offences *cognizable only* before justices in their summary jurisdiction, and therefore an indictment for compounding such an offence was holden bad in arrest of judgment. (*l*) But in *Gotley's case* it was held indictable to compromise a charge under the then Highway Act, subjecting a party to a penalty, which might have been proceeded for in the superior Courts even before any action or proceeding had been commenced. (*m*) The statute 18 Eliz. extends to *penal*

(*i*) *R.* v. *Constable*, 7 Dowl. & R. 663.

(*k*) 7 & 8 Geo. 4, c. 29, s. 68; id. c. 30, s. 34, in the same words.

(*l*) *R.* v. *Crisp and others*, 1 B. & Ald. 282.

(*m*) *Gotley's case*, Russ. & R. Crown Cases, 84.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

actions, although the whole of the penalty be given to the informer, (n) but not to cases of penalties given to a *party aggrieved*. (o) It seems clear, that pending proceedings on the 7 & & Geo. 4, c. 29, s. 30, for petty takings, or injuries not indictable, when the value or damages might be paid to the complainant, he might, at any instant before conviction, compound the charge.

In cases where opportunity occurs for effecting an *amicable adjustment*, especially between neighbours, it would obviously tend to the *future preservation of the peace*, if the magistrate would advise the parties, by their own *agreement*, to settle the difference upon just terms, and thereby prevent a formal adjudication, the precise purport of which he may decline to communicate to either party, and thus probably prevent any exultation or vindictive feeling, frequently incident to a formal decision in favour of either party, and thus also probably occasion even a permanent reconciliation. (p) In order to enforce any agreement that the parties may make, the justices may adjourn or suspend their formal decision, so as to afford the parties an opportunity of making complete satisfaction; and if they should not, they might afterwards draw up their formal acquittal, dismissal, or conviction, according to the evidence.

Decision of the justices.

1. Acquittal and record, or certificate thereof.

If the justices should be of opinion that the evidence does not clearly and certainly establish that the offence was committed as charged in the *information*, they ought to acquit; and the form of such acquittal, after reciting the information and appearance and the hearing, may be as in the note; (q) and in

(n) 4 Bla. C. 136, note 3.

(o) 1 Salk. 30; 2 Hawk. 279.

(p) It will be observed that this was the principle upon which the *reconciliation* clauses in the Local Jurisdiction act were proposed to be enacted into law; but they would have been inefficient for want of power of the *same* judge *immediately* to decide the matter for or against the party refusing to abide by his recommendation.

(q) *R.* v. *Pack*, 6 Term Rep. 375.

Form of acquittal by justices.

County of —— } [*After setting forth the information and plea as usual, proceed thus*] "On the day and year aforesaid, at —— in the county of —— one witness, *W. D.*, of —— in the county of —— cometh before us the justices aforesaid, and before us the said justices, upon his oath, deposeth and saith, in the presence of the said *J. K.*, that on the —— day of —— in the year of our Lord —— he the said *W. D.*, by the order of the said *J. K.*, threw half a pound weight of brimstone upon the charcoal fire, which was then using for the purpose of drying one hundred weight of hops of the said *J. K.* in a certain hop oast, &c., which brimstone was so put upon the said fire for the purpose of making the said hops have a better colour, and that he the said *W. D.* verily believed that in consequence thereof the said hops did acquire a better colour by the fumes of the said brimstone mixing with the said hops, but because the [informer, *W. S.*,] does not produce any other evidence before us, the said justices, against the said *J. K.*, and because all and singular the premises being heard and fully understood by us the said justices, it manifestly appears to us that the said *J. K.* ought not to be convicted of the premises above laid to his charge in and by the said information of the said *W. S.*,

general *an acquittal*, though erroneous, would be conclusive,(r) though it might be otherwise if the ground of acquittal were merely the want of jurisdiction, in which case indeed it is obvious that the decision would rather be a *dismissal* of the complaint than an acquittal on the merits.(s) Some of the older statutes (t) and the recent Game Act, 1 & 2 W. 4, c. 32, s. 46, enact that when *proceedings* have been *instituted* by or with the concurrence or assent of the party aggrieved, the result, whether acquittal or conviction, shall be a bar to any action of trespass or other proceeding; and it would be advisable for the defendant, in general, to have a formal record of the proceeding. Other acts, as the Larceny Act, 7 & 8 Geo. 4, c. 29, s. 70, and the Wilful and Malicious Injury Act, *id.* c. 30, s. 36, in terms only declare that a conviction, when satisfied or pardoned, shall be a bar, without giving any effect to an *acquittal.*

2. Certificate of dismissal under 9 G. 4, c. 31. s. 27, 28.

The 9 Geo. 4, c. 31, s. 27, we have seen, enacts, that if the two justices shall deem the offence not proved, or that the *assault* or *battery* has been justifiable, or so trifling as not to *merit* punishment, then they may *dismiss the complaint;* and in that case they are forthwith to make out a *certificate* under their hands, stating the fact of such dismissal, (u) and shall deliver such certificate to the party against whom the complaint was preferred; and such certificate, or a conviction, shall be a bar to any other proceeding. (v) In other cases of acquittal it may be advisable, although not usual, for the defendant to endeavour at the time to obtain the justice's formal statement of the acquittal; and which, excepting merely in stating that result, may be similar to the prescribed form of conviction, in the 3 Geo. 4, c. 23, and in substance as in the subscribed form.

2. Convictions.

The document called a *Conviction*, is rather a formal *recital*

or of any part thereof; therefore it is considered by us the said justices that he be acquitted of the premises above laid to his charge in and by the said information of the said *W. S.*, and he is thereof acquitted by us the said justices accordingly. Given under our hands and seals this —— day of —— in the year of our Lord ——

(L. S.)
(L. S.)

(r) *R.* v. *Pack*, 6 T. R. 375.

(s) *Semble*, 1 Chitty's Crim. L. 2d edit. 458, 9.

(t) 8 Geo. 1, c. 12, s. 2; and *R.* v. *Midlam*, 3 Burr. 1720.

(u) See form, *infra* next note.

(v) The following may be the form of certificate.

Form of certificate of dismissal of complaint, under 9 G. 4, c. 31, s. 27.

Hertfordshire to wit. } We, two of His Majesty's Justices of the Peace for the county of ——, do hereby certify, that on the —— day of ——, in the year of our Lord ——, at [ ] in the said county of Hertford, *C. D.* of the parish of ——, in the said county, appeared before us the said Justices, charged with having unlawfully assaulted and beaten *A. B.* on the —— day of ——, at the parish of ——, in the said county, and that we the said Justices dismissed the said complaint upon the hearing thereof. Given under our hands and seals this —— day of ——, A. D. 1834. *G. H.* (L. S.) *I. K.* (L. S)

CHAP. IV. SUMMARY PROCEEDINGS, &c.

Time of drawing up and delivering, or returning the same to Sessions.

of the antecedent proceedings, to show that all have been regular, and of the *decision* of the justice or justices, than the decision itself, which is usually pronounced verbally; and at most only *minutes* or *memoranda* are made by the justice or his clerk at the time of his declaring his decision, and which are afterwards (in case the penalty is not paid), with *due expedition* to be drawn up in the full form of a conviction; and the convenience of justices in this respect has been so much consulted, that it has even been decided, that if incautiously an informal conviction has been drawn up, and signed and delivered over to the party convicted, and even actually enforced by distress or imprisonment; yet that afterwards, and at any time before his return to a writ of certiorari, or before the trial of an action of trespass against the justice for his commitment or levy, he may draw up a more formal conviction, provided it correspond with the actual proceeding and evidence before the justice; and he may produce the same, as if it had been *originally* the correct conviction, and thereby establish a complete defence to such action; (*w*) unless the process subsequent to the time of the conviction should betray or disclose, that it was not truly founded on a sufficient conviction. (*x*)

It is however exceedingly imprudent for any magistrate to make any statement, and still more so to deliver any written document as the result of his decision, before he has with due care, and strictly according with the evidence before him, completed his formal conviction; and if in his conviction he should falsely recite any fact, or mistake the evidence, or omit any thing material, he may by mandamus be compelled, with some degree of discredit, and perhaps costs, fully and correctly to state the facts and evidence; and if he were wilfully to mistake the evidence, he might be prosecuted for the misdemeanor. (*y*)

Indeed there is no part of magisterial duty more difficult or delicate, than in that of properly framing his conviction.

We have said that formal convictions should be completed with *due expedition;* and this is requisite at common law; for it is incumbent on justices, within a reasonable time, *gratuitously* to *deliver to the party convicted*, a copy on paper of his con-

(*w*) *R.* v. *Barker*, 1 East, 182; *Still* v. *Wells*, 7 East, 533; *Massey* v. *Johnson*, 12 East, 82; *Bridget* v. *Coney*, 1 M. and R.; Mag. Cases, 1; see also *R.* v. *Huntingdon*, 5 Dowl. & R. 588; *Fawcett* v. *Fowles*, 7 B. & Cres. 394.

(*x*) *R.* v. *Harper*, 1 Dowl. & R. 214.

(*y*) *Ex parte Rix*, and *Ex parte Marsh*, 2 Bar. & Cres. 717; 4 Dowl. & Ry. 264. 352; 2 Dowl. & R. Mag. Cases, 251; *R.* v. *Barker*, 1 East R. 182.

viction, in order that he may determine whether he will appeal when that remedy is allowed, or whether he will endeavour to obtain a writ of certiorari. (z) It has been said, however, that a defendant is not entitled, *as of right*, to have a copy of a conviction, to enable him to appeal against it at the sessions for any matter of *mere form*, or to pick holes in it without regard to the merits; (a) but that doctrine may be questionable, especially as defects in mere matter of form are now cured. (b) The conviction on parchment should also be returned to the Clerk of the Peace at session, not only in cases where a convicted party may appeal, but in all other cases; in order that the Crown or some public fund, now in general the *county rate*, may not be deprived of penalties given to them in numerous cases. (c) The 7 & 8 Geo. 4, c. 29, s. 74, and 7 & 8 Geo. 4, c. 30, s. 40, in express terms, require convictions under those acts to be transmitted to *the next* Court of General or Quarter Sessions. And if by a justice's neglect to return his conviction in due time, a party should be deprived of his appeal, an action might be supported against him for the damage occasioned by his neglect. (d)

Formal parts, and requisites of convictions.

As respects the *form* of convictions, difficulties can rarely occur since the 3 Geo. 4, c. 23, intituled, "An Act to facilitate "summary Proceedings before Justices of the Peace and others," unless a magistrate should, to use the figure of Sir William Blackstone, like an owl, wilfully shut his eyes against the light; (e) for that act directs that "in all cases wherein a con-"viction shall have taken place, and no particular form for the "record thereof hath been directed, the justice or justices, de-"puty lieutenant or other person duly authorized to proceed "summarily therein, and before whom the offender or offenders "shall have been convicted, *shall* and *may* cause the record of "such conviction to be drawn up in the manner and form fol-"lowing, or in any words *to the same effect, mutatis mutandis*, "that is to say," and then the form of the conviction is enacted, and which is subscribed. (f)

(z) *R.* v. *Midlam*, 3 Burr. 1720.
(a) *R.* v. *Huntingdon*, 5 Dow. & Ry. 588; 2 Dow. & Ry. Mag. Cas. 594.
(b) 3 Geo. 4, c. 23; and see as to the right to a copy of a record in Superior Courts, *Brown* v. *Cumming*, 10 Bar. & Cres. 70.
(c) *R.* v. *Eaton*, 2 Term R. 285.
(d) *R.* v. *Midlam*, 3 Burr. 1720.
(e) In *Scott* v. *Sheppard*, 3 Wils. R. 410.

Form of conviction prescribed by 3 G. 4, c. 23. s. 1.

(f) County (*or as the case may be*) of —— } Be it remembered, that on the —— day of ——, in the year of our Lord ——, at ——, in the county of ——, *A. B.* of ——, in the county of ——, labourer (*or as the case may be*), personally came before me [*or* before us, &c.,] *C. D.* one [*or* more, *as the case may be*] of His Majesty's Justices of the Peace for the said ——, and informed

CHAP. IV. SUMMARY PROCEEDINGS, &c.

In what respects imperative, and consequences of deviation.

It will be observed, that the words "*shall and may,*" at least as regards the direction to *set out the evidence as nearly as possible in the words used by the witness,* are *imperative;* and if not observed, either the informer or defendant may, by motion to the Court of King's Bench for a writ of *mandamus,* compel the justice *to reform* his conviction by setting forth at least the substance, although not perhaps *every* word;(*g*) but as the act is by its title to *facilitate* (and not embarrass) summary proceedings, it would seem that independently of the subsequent clause aiding defects *in form,* a conviction deviating in form from that prescribed would not be invalid, nor would be quashed on *that* account. The act expressly excepts forms of conviction specially directed by any particular act; and we have seen that each of the four recent acts relating to summary proceedings, as indeed do almost all modern statutes, direct specific forms very nearly resembling each other, and that in 3 Geo. 4, c. 23.(*h*) As the rules at *common law* may still apply in some cases, and explain and assist, we will concisely state them.

Recital of information.

A conviction, being a record of all the proceedings, so that the superior Courts may judge of their regularity, recites the *information,* usually in the past tense, because unless by consent, or in some particular cases, it must have been preferred some days before the conviction, and should show that it was exhibited within the county and jurisdiction of the justice who issued the

me [*or* us, &c.,] that *E. F.* of ——, in the county of ——, on the —— day of ——, at ——, in the said ——, did [*here set forth the fact for which the information is laid*] contrary to the form of the statute in such case made and provided. Whereupon the said *E. F.* after being duly summoned to answer the said charge, appeared before me [*or* us, &c.,] on the —— day of —— at ——, in the said ——, and having *heard the charge* contained in the said information, declared he was not guilty of the said offence, [*or, as the case may happen to be,* "did not appear before me (*or* us, &c.,) pursuant to the said summons,"] [*or* "did neglect and refuse to make any defence against the said charge."] Whereupon I, [*or* we, &c., *or* nevertheless, I *or* we, &c.,] the Justice, [*or* Justices,] did proceed to examine into the truth of the charge contained in the said information; and on the —— day of —— aforesaid, at the parish of —— aforesaid, one credible witness, to wit, *A. W.* of ——, in the county of ——, upon his oath deposeth and saith, [*if E. F. be present, say* in the presence of the said *E. F.*] that within —— months [*or as the case may be,*] next before the said information was made before me [*or* us, &c.,] the said Justice by the said *A. B.* to wit on the —— day of ——, in the year ——, the said *E. F.* at —— in the said county of ——, [*here state the evidence, and as nearly as possible in the words used by the witness, and if more than one witness be examined, state the evidence given by each;*] [*or if the defendant confess, instead of stating the evidence say,* and the said *E. F.* acknowledged and voluntarily confessed the same to be true]. Therefore it manifestly appearing to me, [*or* us, &c.] that he the said *E. F.* is guilty of the offence charged upon him in the said information, I [*or* we, &c.,] do hereby convict him of the offence aforesaid, and do declare and adjudge that he the said *E. F.* hath forfeited the sum of —— of lawful money of Great Britain for the offence aforesaid, to be distributed [*or* paid, *or as the case may be,*] according to the form of the statute in that case made and provided. Given under my hand [*or* our hands, &c.,] and seal this —— day of ——, in the year of our Lord ——. *C. D.* (L. S.)

(*g*) *Ante,* 189, 190.

(*h*) *Ante,* 134, 138.

summons. We have seen the necessity for justices returning the information in its precise terms. (*i*)

It should next state that the defendant was duly *summoned*, especially if he have not appeared; and before the 3 Geo. 4, c. 23, which prescribes a form in this case, it was usual and advisable to describe the summons and state the proceedings thereon, and the oath of the constable as to the time and place of summons. (*k*) But the 3 Geo. 4, c. 23, merely requires the conviction to state that the party *was duly* summoned and did not appear, and this accords with the usual rule that the Courts will presume that the justices have certified the truth. (*l*)

Recital of Appearance and defence.

The appearance of the defendant, whether in person or by attorney or friend, should be stated according to the fact; and if he objected to the time of the summons, or prayed further time, the facts should be stated accordingly, and what was done thereupon. (*m*) The conviction is also to state, according to the fact, that the defendant heard the charge contained in the information.

Recital of Confession.

If the defendant *confess*, that fact is by 3 Geo. 4, c. 23, now allowed to be stated thus succinctly, "and the said defendant "acknowledged and voluntarily confessed the same (*i.e.* the "charge in the information) to be true;" and then states the decision of the justice; and any statement of evidence would be unnecessary.

Recital of Evidence.

Supposing there has been no confession, then at common law (*n*) as well as according to the form prescribed by the 3 Geo. 4, c. 23, the *names of each witness* in support of the information, and his giving his evidence upon *his oath* in the presence of the defendant, if he have appeared and be present, must be stated. The statement of the name of the witness, we have seen, was considered essential, in order that it might appear affirmatively that he was a different person to the informer, and not interested in the penalty; (*o*) and if the statute on which the conviction is founded, in terms requires the oath of a *credible* witness, it was held that the conviction must aver that fact. (*p*) The form prescribed in 3 Geo. 4, c. 23, expressly requires the statement to be "a *credible* witness," (*q*) and requires that it be stated that the evidence he gave was in the presence of the de-

(*i*) *Ante*, 185.

(*k*) See form, Dickenson's Justice, title Convictions.

(*l*) 10 Mod. 382; *Basten* v. *Carew*, 3 B. & Cres. 649.

(*m*) *R.* v. *Simpson*, 1 Stra. 44; *R.* v. *Stone*, 1 East, 639.

(*n*) *R.* v. *Crowther*, 1 T. R. 125; *R.* v. *Bennett*, 6 T. R. 75.

(*o*) *Ante*, 188; 2 Lord Raym. 1545; 1 Stra. 316; Andr. 18, 240.

(*p*) *Ex parte Alridge*, 2 B. & Cres. 600; 4 Dowl. & R. 83, S. C.

(*q*) See form, *ante*, 198, in notes.

fendant, but not that he, witness, was *sworn* in his presence. Nor is it necessary to state *how* the witnesses were sworn. (r) In a recent case it was held that from a statement that certain witnesses came before the justices upon their oaths to them severally and respectively administered, it substantially appeared that the oath was administered to the witnesses in the presence of the *magistrate*; (s) and if the appearance of the defendant be stated, and the subsequent proceedings also appear to have been continuous, it will be presumed that they were all in the defendant's presence. (t)

Mode of stating the evidence.

If there be *several* witnesses, the 3 Geo. 4, c. 23, appears to require the evidence of each to be stated separately. The form also prescribes that each witness shall have stated, if possible, the *day* of committing the offence, and that it was within the *limited time* before the information was made before the justice who received the information; (u) and as well at common law as under this act, the *place* where it was committed must be shown to have been in the county throughout which the convicting justice has jurisdiction. (v)

The mode of stating the evidence of the offence itself is now prescribed and enforced by 3 Geo. 4, c. 23, according to the principles that always were *recommended* by the Courts even at common law, but too frequently not observed, viz. "the statement of the evidence *as nearly as possible in the words used by the witness*." Justices therefore are not to state what they may think is *the result* of the testimony or proofs, but at least the principal words, without altering their *sense* in any respect. It has, however, been considered that they are not absolutely required in all cases to state *all* the *very* words, especially where the evidence is irrelevant, although the safer course is to do so, (w) and the *whole* of the evidence, as well for as against the defendant. (x) It is, we have seen, the duty of a magistrate not to suffer the witnesses to swear in the very terms of the statute; (y) and the Courts, we have seen, have laid it down as a rule, that at least the clerks of justices, if not themselves, should

(r) *R.* v. *Selway*, 2 Chit. R. 522.

(s) *R.* v. *Glossop*, 4 B. & Ald. 616; but note, the conviction imputed that the evidence was given in defendant's presence.

(t) Id. ibid. and *R.* v. *Lovet*, 7 T. R. 152; *R.* v. *Swallow*, 8 T. R. 284; *R.* v. *Crisp*, 7 East, 389.

(u) *R.* v. *Woodcock*, 7 East, 146; *R.* v. *Crisp*, id. 389.

(v) *R.* v. *Jeffries*, 1 T. R. 241; *R.* v. *Smith*, 8 T. R. 538.

(w) *R.* v. *Warnford*, 5 Dowl. & R, 499; and *R.* v. *Rix*, 4 Dowl. & R. 354.

(x) *R.* v. *Clark*, 8 T. R. 220; and per Abbott, C. J. in *R.* v. *Rix*, 4 D. & R. 354.

(y) *R.* v. *Allen*, cited Paley on Convictions, by Dowling, 165, in note, 5 Dowl. and Ry. 490, cited.

take down the words as they were used. (*z*) There are two modes, either of which may be safely adopted; the first to take down the very words of all the *questions and answers precisely* as they were put and answered; and the second merely to set out the statement of each witness as if it were continuous, and omitting the questions. The former, as most strictly complying with the directions of the statute, is recommended as the most explicit and certain. If neither course be adopted, and the justice state only the result, and draw an erroneous conclusion, we have seen he may be compelled to state the evidence in the terms prescribed by the act; and if the affidavits on which the motion for the *mandamus* be founded should raise a suspicion of an unjust motive on the part of the justice, and that he had been previously requested to alter his conviction, but without effect, he may at least have to pay the costs of the motion; (*a*) and he might be prosecuted if he have wilfully drawn an incorrect result. (*b*)

With respect to the statement in the conviction of the evidence as to the substance of the charge, justices are only required to state the *facts* correctly, as the witnesses swear; (*c*) for it is the business of the complainant or informant to see that his information be proved, and the requisites of which we have considered. (*d*) If there have been averments in the information that the defendant is not within any exceptions in an enacting clause, we have seen that the informer need not in general prove the averment, but the defendant must prove any facts to bring himself within the exception; and unless he do so the conviction need not suppose that the informer gave any evidence, nor need it suppose that any evidence as to the exceptions was given. (*e*)

Statement of the defence and evidence for the defendant.

Although the form of conviction prescribed by 3 Geo. 4. c. 23, in terms only requires the *whole* of the *evidence* to be stated, and does not prescribe the form that the defendant was formally called upon for his defence, yet it is proper to introduce that statement, after the evidence for the complainant, (*f*) as thus:—" Whereupon the said defendant is asked by me the " said justice, what he hath to say or offer in his defence, or " as evidence against the said information and offence, and in " answer to the evidence so given as aforesaid, and what he hath

(*z*) *Ante*, 200, note (*w*), *R.* v. *Marsh*, Bar. & Cres. 717; 4 Dowl. & Ry. 260. S. C. *ante*, 189, 190.

(*a*) *Ante*, 198, and 1 Vol. 793, 4.

(*b*) *R.* v. *Pearce*, 9 East, 358.

(*c*) 3 Geo. 4, c. 23; see form, *ante*, 198, in note.

(*d*) *Ante*, 155 to 171.

(*e*) *R.* v. *Turner*, 5 M. & S. 206; *R.* v. *Marsh*, 2 B. & Cres. 717.

(*f*) See form, in *R.* v. *Clark*, 8 T. R. 221; 15 East, 456; Paley on Conv. 32.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

"to say why he should not be convicted of the said offence; "whereupon the said defendant saith that &c." [here state concisely the substance of the alleged defence, and if the defendant has called witnesses, state the same, as thus:] "And "thereupon now here one credible witness, to wit, L. M. of, "&c. upon his oath deposeth and saith, in the presence of the "said A. B. the said complainant, that, &c." [here state the terms of the evidence, as nearly as possible in the words used by the witness, as directed with respect to the evidence for the informer, and after stating the whole of the evidence on the behalf of the defendant, state the decision of the justice.]

What evidence on the face of the conviction will suffice to sustain it.

The very object of the statute thus requiring the evidence as well for the informer as for the defendant, to be set forth in the conviction was, that the Court might see upon the face of it that there had been at least *sufficient evidence* to authorize the justices to convict, and that also of the *very* offence as charged in the information, and not of a different offence. (*g*) If the evidence stated upon the face of a conviction be such as that, *no reasonable person could draw from it the conclusion of guilty*, then the conviction would be invalid; (*h*) but if there be any evidence that might upon a trial of an action have been left to the jury, then the conclusion of guilty, drawn by the justice, cannot be vacated or disturbed. (*i*) In one of the most explicit cases on this subject, the Court said, "If there has been *any* "*evidence* whatsoever, *however slight*, to establish the point, "and the magistrate who convicted the defendant has drawn "his conclusion from that evidence; we will not examine the "propriety of his conclusion, for the magistrate is the sole "judge of the weight of evidence." (*i*) Perhaps where there has been conflicting testimony of several witnessess, and the magistrate should disbelieve the testimony of one or more, he should, nevertheless, state the whole of the evidence given; but in stating the testimony of the witness he disbelieves, he should omit the word "credible," and add, "but the testimony of the "said *Y. Z.* was given in a manner which I think, and do find, "did not entitle him to credit or to be believed, although stated "upon his oath as aforesaid;" or if any witness swore that the other witness was not to be believed, the latter testimony should be stated.

The form of the *adjudication* in general.

After stating the whole of the evidence, the conviction pro-

(*g*) *R.* v. *Warnford*, 5 Dowl. & R. 489; *R.* v. *Harper*, 1 Dowl. & R. 214; 2 D. & R. Mag. C. 67, S. C.

(*h*) Per Abbott, C. J. in *R.* v. *Glossop*, 4 B. & Ald. 616.

(*i*) Id. ibid.; *R.* v. *Smith*, 8 T. R. 590; *R.* v. *Reason*, 6 T. R. 376.

ceeds immediately to the *adjudication*, which, according to the form prescribed in 3 Geo. 4. c. 23, (*k*) runs, "Therefore it "manifestly appearing to me [*or* us, &c.] that he the said "*C. D.* (naming him) is guilty of the offence charged upon him "in the said information, I [*or* we, &c.] do hereby convict him "of the offence aforesaid, and do declare and adjudge that the "said *C. D.* hath forfeited the sum of —*l.* of lawful money of "Great Britain, for the offence aforesaid, to be distributed [*or* "paid, as the case may be] according to the form of the sta- "tute in that case made and provided. Given, &c." Before this act it was established, that no particular form or style of adjudication was necessary, and the words "that *C. D.* accord- "ing to the form of the statute, is convicted," was considered a sufficient adjudication. (*l*) But it was always considered essential that there should appear that a *judgment* was pronounced, and that the same should in substance be precise and certain, (*m*) and that even in cases where a *forfeiture* or *punishment* would be the legal and imperative result, yet that the justice must *adjudicate* that the same has been incurred, although he had no discretion or power to prevent that result; (*n*) and we have seen, that the form prescribed by the 3 Geo. 4. c. 23, still requires the adjudication as to the forfeiture. (*o*) But as to the *distribution* of any penalty, it was held that when the justice has no discretionary power, it suffices if he adjudges that it shall be distributed or paid according to the statute in that case made and provided, or, "as the law di- "rects;" (*p*) and the form in 3 Geo. 4. c. 23, is to the same effect. But when the distribution is uncertain or discretionary, there must be an express adjudication how the same shall be divided or applied. (*q*)

As to the adjudication negativing exceptions.

The form in 3 Geo. 4. c. 23, it will be observed, seems to dispense with the previous *supposed* necessity for the justice, in his *adjudication*, negativing any exemptions or exceptions. (*r*)

(*k*) *Ante*, 197, 198, in note.

(*l*) *R.* v. *Thompson*, 2 T. R. 8; *R.* v. *Jefferies*, 4 T. R. 768; *R.* v. *Chandler*, 14 East, 267.

(*m*) Paley, 206, 208.

(*n*) *R.* v. *Hawkes*, 2 Stra. 858; *R.* v. *Vipont*, 2 Burr. 1163; *R.* v. *Ashton*, 8 Mod. 175; *R.* v. *Harris*, 7 T. R. 238; *R.* v. *Salomons*, 1 T. R. 251.

(*o*) *Ante*, 198, in note.

(*p*) Salk. 383.

(*q*) *Post*, *R.* v. *Dempsey*, 2 T. R. 96; *R.* v. *Priest*, 6 T. R. 538; *R.* v. *Smith*, 5 M. & S. 133.

(*r*) Before the 3 Geo. 4, c. 23, such negative in the *adjudication* was *supposed* to be necessary. It was certainly so in the *information*, *ante*, 167, 8; but as the exemption or exception was to be proved by the *defendant*, and unless so proved his guilt was established (*R.* v. *Turner*, 5 M. & S. 206) it seems absurd to require the justice to *adjudge* upon a matter upon which no evidence had been given before him. There is some confusion in the books upon this point, in consequence of the reporter or author not distinguishing between the requisites of an *information* and of a *conviction*. In *R.* v. *Jukes*, 8 T. R. 542, the information did not ne-

Supposing, however, that the statute upon which the proceeding is founded substantially requires the exceptions to be negatived in the conviction and adjudication, as well as in the information, then the omission in the former would be fatal, and not aided as matter of *form* by the 3 Geo 4. c. 23. s. 3. (*q*) In a leading case before that statute, Lord Kenyon said that "the *conviction* itself should shew that the party accused *had not the defence* which the act gives him;" (*r*) and therefore, though it seems singular that a justice should be required to find a fact upon which the defendant has not thought proper to adduce any evidence, the safer course may be to introduce the negative adjudication in the conviction, in all cases where the *enacting* clause states exemptions or exceptions. (*s*)

Statement of the *offence* in the *adjudication*.

It will be observed, that in the form prescribed by 3 Geo. 4, c. 23, the justice is merely required to state that he convicts "*of the offence aforesaid*," meaning the offence as previously charged in the recited substance of the *information*, and which we have seen must correspond with the information as originally framed, and upon which the defendant was summoned. (*t*) Hence it will follow, that in general, if the *information* was in *substance* defective, the conviction cannot aid; and we have seen, that the conviction cannot be for another, either different or larger offence, than that stated in the information; (*u*) or, as for an act committed with a *different intent*, or under *another statute* than that charged: (*v*) thus, we have seen, that if the information charged that the defendant wilfully and maliciously cut and damaged, and carried away a post, or part of a fence, &c., which is an offence against the 7 & 8 Geo. 4, c. 30, the defendant cannot be convicted of merely *carrying it away with intent to steal*, that being an offence under a different act, the 7 & 8 Geo. 4, c. 29. (*v*)

Statement of the defendant's waiving objections to infor-tions.

If the original information was defective, and the defendant, upon the hearing, expressly *waived* the objection, then the justice should, before he proceeds further, have the information made perfect, and should state in his conviction that fact, and the defendant's waiving the necessity for a fresh summons; and then the conviction may state "that the defendant was guilty of the said offences so charged in the

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gative the exemption; and that was the defect which was considered fatal, although the marginal analysis only refers to the conviction.

(*q*) *R.* v. *Jukes*, 8 T. R. 542.

(*r*) Id. 544.

(*s*) *R.* v. *Turner*, 5 M. & S. 206; see *ante*, 167, 8, 191, 2; and see the form, Chitty's Game Laws, 2d edit. 750.

(*t*) *Ante*, 185.

(*u*) *Rogers* v. *Jones*, 3 Bar. & Cres. 409; 5 Dow. & Ry. 268; *R.* v. *Soper and others*, 3 Bar. & Cres. 857; 5 Dow. & Ry. 669, S. C.

(*v*) *R.* v. *Harper*, 1 Dowl. & Ry. 223.

(*w*) Id. ibid.

"said information, when the same had been so amended by "and with the said defendant's consent as aforesaid."

Certainty in stating the offence.

We have seen the *necessary certainty* in an *information*, (*x*) and which must also be observed in the conviction, whenever it is necessary therein to set forth the circumstances of the offence. It has recently been decided, that in a conviction and commitment under the Game Act, for trespassing *on land* in the day time in pursuit of game, it is sufficiently certain to state that the defendant trespassed in pursuit of game on *certain land* in the possession of *A. B.*, without giving the land any name, or setting it out with abuttals. (*y*) But it must be observed, that in general questions as to certainty in the description of an offence more properly relate to the information than the conviction.

Uncertainty in the information, when or not aided by conviction.

It is clear, that in cases where it is essential to the charge, that not only an act has been committed, but also that to complete the offence, it should have been committed under certain *collateral circumstances*, then the information must have averred those facts, or a conviction upon it would not be sustainable. (*z*) So, if the information charged the offence in the alternative, "as used, *or* intended to use," and this alternative charge be *continued* in the conviction, the latter could not be sustained. (*a*) And even if the defendant appear, and do not object on the hearing to the uncertain charge in the information, and the evidence establish that the defendant was guilty of one part of the charge, even then it has been held, that the justice cannot in his conviction aid the defect in the information, by adjudging, not that the defendant was guilty *of the offence aforesaid*, but that he was guilty of *that part* of the charge which had been so established. (*b*)

Conviction of several offences.

We have seen, that although not usual, nor in general advisable, yet several offences may be included in the same information and stated in several counts, or parts thereof; and, consequently, may also be adjudicated upon in one conviction. (*c*) If the justice convict of *all* the offences charged in the information, his conviction should be in the plural, "of the offences aforesaid;" or he may distictly adjudicate on each. If there be several offences charged in the information, a con-

(*x*) *Ante*, 155, to 171, as to certainty in general.

(*y*) *R.* v. *Mellor*, 2 Dowl. Prac. Rep. 173.

(*z*) *Ex parte Hawkins*, 2 B. & Cres. 21; 3 Dowl. & R. 20[?].

(*a*) *R.* v. *Pain*, 5 B. & Cres. 251; 7 Dowl. & R. 678, S. C.; *R.* v. *North*, 6 Dow. & Ry. 143.

(*b*) *R.* v. *North*, 6 Dow. & Ry. 143, *sed quære*; and note that in that case the conviction *continued*, and did not attempt to aid the ambiguity.

(*c*) *Ante*, 169; *R.* v. *Swallow*, 8 T. R. 286.

viction, stating that the defendant was guilty of the *offence* aforesaid, would, it has been considered, be void for uncertainty which of the several offences was referred to. (*d*) When the justice intends to convict of one of several charged offences, he must be particular in shewing which; and should, in terms, acquit or dismiss the complaint as to the residue.

Adjudication as to forfeiture, punishments, &c.

As respects the forfeiture or punishment, we have seen that the form prescribed in the 3 Geo. 4, c. 23, continues the necessity for an adjudication, even where the penalty or imprisonment is fixed, and the justice has no discretion. (*e*). Where the statute gives any discretionary judgment, then it will be obvious that the justice must be certain and explicit in his adjudication. (*f*) But if the statute require a conviction in a penalty, and then adds, that on default of payment, the party shall be subject to certain corporeal punishment or imprisonment, it suffices to adjudge the payment of a prescribed penalty without noticing the *contingent punishment*, which must be the subject of a subsequent application to a justice. (*g*) As regards the adjudication for a fixed penalty, if it name too small a sum, it will be as invalid as if it were too large. (*h*) If the penalty is to be only according to the *value*, or the amount of the *real injury*, then the justice must take care duly to ascertain the amount, and adjudicate accordingly; and if the injury were less, his direction to pay the largest sum he has power to fix, when greatly exceeding the actual damage, would be improper, if not invalidate his conviction on appeal. (*i*) When the penalty is in the *discretion* of the justice, he should take care and exercise a sound discretion, and fix the proper amount, especially when he has power to *mitigate* a penalty fixed by the act; (*k*) and it is said that in the latter case the conviction should first fix or name the penalty incurred by the statute, and then, in a separate sentence, state to what smaller sum the justice does thereby mitigate it, for otherwise it could not appear that he had exercised his authority in both points according to the terms of the statute. (*l*) But it would seem sufficient for the justice at once to adjudicate "that the defendant hath forfeited and shall pay a named sum

(*d*) *R.* v. *Salomons*, 1 T. R. 249; and yet it has been held, that "*misdemeanor*," in the singular, is *nomen collectivum*, and may include several crimes of that nature.

(*e*) *Ante*, 198, in note; and *R.* v. *Harris*, 7 T. R. 238; *R.* v. *Hawkes*, 2 Stra. 858.

(*f*) *R.* v. *Vipont and others*, 2 Burr. 1163; and see Burn J. tit. Commitment.

(*g*) *R.* v. *Chandler*, Carth. 501; *R.* v. *Helps*, 3 M. and S. 331.

(*h*) *R.* v. *Salomons*, 1 T. R. 249.

(*i*) *R.* v. *Harper*, 1 Dowl. and R. 223.

(*k*) *Reeve* v. *Poole*, 4 Bar. and Cres. 156.

(*l*) Dick. Sessions, 3d ed. 595; Paley, 209, 210; and see form, Chitty's Game Law, 2d edit. 765; 1 Burn J. 851.

"as the penalty for his said offence, mitigated by me the said "justice, pursuant to the statute."

Distribution or application of the penalty.

The form, in 3 Geo. 4, c. 23, concludes "to be *distributed* or "paid according to the form of the statute in that case made "and provided;" but this only applies when the justice has no discretion; when he has, he must carefully exercise it, and declare in express terms how he has done so, or the conviction may be void. (m) The form under the 7 & 8 Geo. 4, c. 29, and c. 30, state by what terms, and when the penalty is to be paid to the party aggrieved, or when and how otherwise. (n) If there be any uncertainty in the parish or township, to whom the penalty or a part is to be paid, it will be void; (o) and where the penalty is to be paid to the person who seised the forfeited article, the evidence as well as the adjudication must expressly show who, in particular, effected the seizure, to whom the money is to be paid, or the conviction would, on *certiorari*, be quashed. (p)

Adjudication for costs.

The acts giving summary proceedings for small offences sometimes contain particular directions relative to *costs;* but independently of any such particular provisions, the *general act*, 18 Geo. 3, c. 19, provides for the costs of such proceedings, as well for the informer as the defendant. It enacts that "where *any* "complaint shall be made to a justice, &c., and any warrant or "summons shall be issued, it shall be *lawful* for the justice or "*justices, &c. who shall have heard and determined the com-* "*plaint*, to award such *costs* to be paid by *either of the parties*, "and in manner and form as to him or them shall seem fit, to "the party injured; and if not forthwith paid, the said justice "or justices, by warrant under their hand and seal, may levy "the same by distress and sale of the goods and chattels of the "person; and if no goods, may commit the party to the house "of correction for the county where he resides, there to be kept "to hard labour for not less than ten days, nor more than one "month, or until such sum, together with the expenses attend- "ing the commitment, be first paid." Under this act, or any other that authorizes a justice on summary conviction to award the costs of or *antecedent* to conviction, he must ascertain and insert the same in his conviction, and not leave the amount in the discretion of the constable or other person; and an adjudication even that the defendant shall pay the *reasonable* charges of a *levy*, was holden bad, however difficult it may be for a jus-

(m) *Ante*, 198, in note; *R.* v. *Smith*, 5 M. & S. 133; *R.* v. *Dempsey*, 2 T. R. 96.
(n) *Ante*, 138.
(o) *R.* v. *Priest*, 6 T. R. 538.
(p) *R.* v. *Smith*, 5 M. & S. 133.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

tice to ascertain the contingent expense.(q) In a late case it appeared that the warrant of commitment, under the then Stage Coach Act, 50 Geo. 3, c. 48, recited the conviction, from which it appeared that the defendant had been committed by the justices for three months, "unless before that time he pays the "sum of 6*l*., together with the expenses of the warrant, viz. "a sum of —— shillings," without specifying the precise sum he was to pay for expenses; and Abbott, C. J., said the defendant here certainly cannot know on what terms he is to be discharged, and the gaoler is equally in the dark. The conviction and commitment should have ascertained *precisely what sum* for expenses the defendant was to pay. Let the conviction be quashed and the defendant discharged.(r) But the 27 Geo. 2, c. 20, s. 2, enables the constable or officer making a distress for a penalty, to deduct the reasonable charges of taking, keeping, and selling the distress, out of the money arising from the sale, and he is to pay the overplus to the party distrained upon; and in that case the *officer*, and not the justice, is to fix correctly and at his peril, the reasonable costs.(s) If the officer retain too much, he may be sued for the amount; (t) and if he neglect to return what he has done, the justice may fine him. (u)

Conclusion of conviction, and the date, signing and sealing.

The form prescribed in 3 Geo. 4, c. 23, concludes, "Given "under my hand [or, under our hands] *and seal*, the —— day "of —— in the year of our Lord ——." This form implies that the convicting justices must respectively *sign* and actually formally *seal and deliver* or execute the conviction as if the same were their deed, the latter ceremony importing that they have fully considered or resolved upon the antecedent conviction as the result of their judgment and determination. (v) These were always at common law considered essential to the validity of a conviction. (w) The date is essential to show the time when the conviction was made, which sometimes we have seen is

(q) *R.* v. *Payne*, 4 Dowl. and R. 72; *R.* v. *Symons*, 1 East, 189; *R.* v. *Patchett*, 5 East, 330; *R.* v. *Nottingham*, 12 East, 57; and see *R.* v. *Elwell*, 2 Lord Raym. 1514; *R.* v. *Hill*, Cowp. 60, S. P.

(r) *R.* v. *Payne*, 4 Dowl. and R. 72. In these cases the justice might with propriety insert a sum in his conviction and warrant to levy or commit sufficient to cover any *contingent prospective expenses*, as the reasonable expenses of the constable in travelling to make a distress or seizure, the keeping such distress for seven days, the valuing the same, and the expense of an auctioneer's selling the same, with the auction duty, if any; and then if the defendant should pay the amount immediately he might be allowed a rebate for charges not incurred.

(s) See also the general act, 5 G. 4, c. 18, *post*.

(t) *Umphelly* v. *M'Lean*, 1 B. and Ald. 42.

(u) 1 Salk. 380; Paley, 244.

(v) *Ante*, 198, in note; Plowd. 308.

(w) *R.* v. *Elcval*, 2 Stra. 794; *Basten* v. *Carew*, 3 B. and Cres. 649; Dalt. Justice, chap. 115.

essential; (*x*) and yet it has been holden that if the date were impossible or incongruous, it may be rejected as surplusage, and will not vitiate if the correct time can be ascertained. (*x*) But the time of the actual subscription and sealing is not material, nor need it correspond with that on the face of the conviction. (*y*) We have considered when in case of a conviction by two or more justices, they must be both present together at the same time pending the hearing of the evidence, and actually concur and sign their conviction. (*z*)

Convictions upon particular statutes.

The foregoing observations principally refer to the *common law* requisites of a conviction, and those prescribed by the *general act*, 3 Geo. 4, c. 23, but which expressly excepts other cases where any *particular act* prescribes *another* form; (*a*) and we have seen that most of the modern acts, as the 7 & 8 Geo. 4, c. 29, and c. 30, 9 Geo. 4, c. 31, 1 & 2 W. 4, c. 32, prescribe a particular form to be observed, and which must not be materially departed from. (*b*) As respects these, as well as convictions in the form prescribed by the 3 Geo. 4, c. 23, the general rule to be observed is, that the *very words* directed to be used, must be literally pursued, when the statute says, that the conviction shall be in the form following: (*c*) or if the enactment be "*or* "*in words to the same effect,*" then that the conviction must either *strictly* adopt the prescribed form, or at least must be according to the *intent and purpose* of the act. (*d*) And in all these cases, as under the 3 Geo. 4, c. 23, the justice might, by *mandamus*, be compelled to reform an imperfect conviction, according to the spirit of the statute. (*e*) Some acts give so general a form of conviction, as not even to disclose what particular offence had been committed, but merely that "the party "was convicted of a certain offence contrary to law," (*f*) whilst others permit the omission of any statement of the information, summons, or evidence, and merely require the magistrate to shew of what offence he has convicted the party. In these cases it has been justly observed, that great precision and certainty

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(*x*) *R.* v. *Picton*, 2 East, 196.

(*y*) Id. ibid. *R.* v. *Barber*, 1 East, 185.

(*z*) *Ante*, 192, 197, 8, note (*f*).

(*a*) 3 Geo. 4, c. 23, s. 1, *ante*, 197, 8.

(*b*) *Ante*, 132 to 143.

(*c*) *R.* v. *Jefferies*, 4 T. R. 769, *ante*, 198.

(*d*) *R.* v. *Priest*, 6 T. R. 538.

(*e*) *Semble ante*, 200, 201.

(*f*) See the constitutional observation of Mr. Adolphus, in his able observations on the enormous and dangerous powers given to a single justice by the Vagrant Act, 5 Geo. 4, c. 83, and other acts; Pamphlet published A. D. 1824.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

ought to be, and is required, in showing the jurisdiction of the justice, and the offence, and a negative of all circumstances that might by any exception in the enacting clause in the act have afforded ground of defence. (g) Very frequently a concise and *prima facie* very easy form, is given in particular acts, with a short direction in these terms: "*here state the offence,*" leaving a blank in the form where it is to be introduced. In these cases the justice must observe all the requisites of an information in stating the *offence,* which we have already so fully considered. (h) So that in those cases, he in reality incurs more trouble and risk than in ordinary cases, where the *informer* must lay before him an information in all respects unobjectionable. (i) In these, and indeed in all other cases, *unnecessary particularity* in stating more than is absolutely required will not prejudice, but will be rejected as surplusage; (k) and therefore in cases of doubt, the best course is to set forth every thing that has been proved. (l)

Defects in convictions, when aided.

If it appear upon the face of a conviction that no offence was committed, then it will be invalid; and in case any proceeding by distress or imprisonment should take place under colour of the same, the magistrate who issued the warrant thereon will, although the conviction remain *unquashed,* be liable to an action of TRESPASS for the seizure or imprisonment; or if the same has been quashed, he may be liable under the 43 Geo. 3, to an *action on the case,* if malice can be proved. (m) If a conviction be *legal on the face of it,* then as long as it stands unquashed, it will protect the magistrate for any thing done under it. (n) In these cases also, if the conviction, although correct in form, was nevertheless improper on the *merits,* and an appeal has been *expressly given* to the convicted party; he may again try the *merits* on certain terms by appeal to the session, (viz., in general those of entering into a recognizance, and giving notice of appeal); and if there be a material defect in the conviction or previous proceedings, and the writ of certiorari be not *expressly taken away,* then the defendant may remove the same into the Court of King's Bench, and

(g) Dick. Sess. 3rd ed. 394, 5; *R.* v. *Neild,* 6 East, 417.
(h) *Ante,* 162, to 169.
(i) *R.* v. *Hazell,* 13 East, 139.
(k) *Ante,* 158.
(l) *R.* v. *Jefferies,* 4 T. R. 768.
(m) *Post,* 230.
(n) *Gray* v. *Cookson,* 16 East, 21; 1 Brod. & Bing. 432, 457; 7 T. R. 623, and *post,* 228 to 231.

there cause the conviction to be quashed and prevent process thereon; or if such process has issued and been enforced, he may obtain restitution, or release from imprisonment. At common law it frequently occurred, that although the conviction was just and proper as regarded the defendant's *guilt*, yet some formal defect was afterwards discovered by the defendant in the conviction, which enabled him to quash the conviction, and this at a time when it was too late to proceed *de novo*; and although some particular statutes limited the defendant's power in a few cases, there was *no general statute of amendment* relative to conviction, until the 3 Geo. 4, c. 23; the 3rd section of that statute therefore enacted, "That in all cases where it appears by the "conviction, that the *defendant has* appeared and pleaded, and "the *merits* have been tried, and that the defendant has not "appealed against the said conviction when an appeal is allowed, or if appealed against, the conviction has been affirmed, "such *conviction* shall not afterwards be set aside or vacated "in consequence of any *defect of form* whatever; but the "construction shall be such a *fair and liberal construction*, as "will be agreeable to the justice of the case."

It will be observed, that this act only applies to a conviction *after* the defendant has *appeared and pleaded*, and only extends to defects in *form*; convictions therefore *ex parte*, where the defendant having been summoned, has neglected to appear, or having appeared will not plead, or otherwise say not guilty, and defend upon the hearing, are not, when defective even *in form*, aided by this act, nor are defects in *substance* in any case aided.

It was decided under an antecedent act, containing an aiding clause somewhat similar, that the omission to state in the *information and conviction*, *exceptions* in the enacting clause, was a defect *in substance*, not aided by such enactment. (*o*) We have seen that appearance *and pleading* to an information, aids any defect in the summons, or even the total omission thereof, unless the defendant prays further time. (*p*)

Delivery of copy of conviction, and returning conviction to sessions.

We have adverted to the perhaps questionable *right* of the defendant to have a copy of the conviction delivered to him by the justice; and the *duty* of the justice, within a reasonable time, to *return his* formal conviction in writing to the clerk of the sessions, in order that the defendant may at least *there*

(*o*) *R.* v. *Jukes*, 8 T. R. 536.

(*p*) *Ante*, 176.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

obtain a copy, and take due proceedings for an appeal when given, and to secure the due appropriation of the penalty when paid or levied. (q) If the justice has delivered a copy to the defendant, and returned a varying copy to the sessions, the Court can only proceed on the latter. (r)

Enforcing the payment of penalty or punishment.

When a reasonable doubt is suggested as to the legality of the conviction, or the *right*, or the *means* of enforcing payment of the penalty or punishment, the Court of King's Bench will not compel the justice to incur the risk of an action; (s) but will by mandamus compel the issuing of a proper warrant, if the suggestion of risk be colourable or not unreasonable. (t) The general rule is, that when a conviction is of *doubtful validity*, the Court will not compel a justice to issue his warrant; (u) but if the objection be merely in a defect *in form*, and therefore the conviction is not void, or would be aided by 3 Geo. 4, c. 23, s. 3, then it would be otherwise. (v)

Execution on the conviction by *warrant of distress* or of imprisonment.

The *modes* of enforcing a conviction adjudging that a *pecuniary penalty* shall be paid, either with or without costs, depend entirely on the *particular act* creating the offence, and whether it *expressly* authorizes a distress warrant. If it contain such an *express* enactment, then the *general* act 5 Geo. 4, c. 18, enables the justice either to issue a *distress* warrant or a warrant of *commitment;* and which by the 2nd section of 3 Geo. 4, c. 23, may be issued either by the convicting justices, or by *any one justice* of the county where the conviction took place; and it should seem that in *all* cases, the payment of the *costs* of a summary conviction may be enforced by distress, under the express enactment of 18 Geo. 3, c. 19. (w)

Distress warrant. (x)

But at *common law*, and by the *present general law*, no *warrant of distress* upon *goods* can be issued or levied; and it is only by *particular statute* and *express* enactment, that even at this day a *distress* can be made. (x) Therefore in each particular case the statute upon which the summary proceeding is founded must be examined, to ascertain the precise powers. The general act 5 Geo. 4, c. 18, s. 1, only applies in cases where

(q) *Ante*, 196, 7.

(r) *R.* v. *Allen*, 15 East, 332; and see *R.* v. *Jukes*, 8 T. R. 625; *R.* v. *Medlam*, 3 Burr. 1720; *post*, 217.

(s) *Ante*, 173, 4.

(t) Id. ibid. *R.* v. *Robinson*, 2 Smith R. 274.

(u) *R.* v. *Brodrip*, 5 Bar. & Cres. 239; 7 Dowl. & Ry. 861; *R.* v. *Robinson*, 2 Smith R. 274; *R.* v. *Buckinghamshire*, 1 B. & Cres. 485; 2 Dowl. & R. 689; *ante*, 1 Vol. 794.

(v) *R.* v. *Robinson*, 2 Smith R. 274; Dick. Sess. 576, 3d edit.

(w) *Ante*, 207.

(x) See fully Burn J. tit. Distress, and cases there cited; 6 East, 175; Paley, 234.

some act has *expressly* authorized a *distress warrant*, and then that act gives the justice a discretionary power to proceed by distress or commitment, as he may think would be the least injurious to the offender and his family. The four recent *general acts*, 9 Geo. 4, c. 31, s. 27, 7 & 8 Geo. 4, c. 29. s. 67, 7 & 8 Geo. 4, c. 30. s. 33, and 1 & 2 W. 4, c. 32. s. 38, 9, appear to suppose that only a warrant to *commit* for the penalty incurred by committing a *common assault or battery*, or *petty stealing*, or small *wilful* or *malicious injury*, or *trespass* in pursuit of *game*, shall be issued, *and not a distress warrant;* and therefore, it should seem that no distress can be sustained on these acts, though, perhaps, under the *general act* 18 Geo. 3, c. 19, the *costs* may be *distrained* for. Probably the legislature considered that a warrant to commit would be *less expensive* than a distress warrant, and therefore enjoined that course of proceeding. The *general act* 5 Geo. 4, c. 18, contains very full directions and discretionary powers when a justice has authority to issue a *distress* warrant, and then superadds as an incident the power of commitment; and he may then imprison in the first instance without waiting for a return of *nulla bona* upon a distress warrant. To avoid any useless extension of this part of the subject beyond our present limits, the reader is requested to refer to the 26th edition of Burn's Justice, title Distress and Commitment, for the whole law applicable to those modes of enforcing a conviction. (*y*)

No replevin lies.

Although the statutes use the term *distress*, yet the proceeding is in the nature of an *execution*, and goods taken under a distress founded upon a conviction under the game laws, or other penal statute, are not repleviable. (*z*)

Sale of goods distrained, &c.

When a distress has been authorized, then the 27 Geo. 2, c. 20, contains a general power *to sell* the distress at such time as the justice may direct; and the 33 Geo. 3, c. 55, authorizes justices to execute a warrant of distress in a county different to that where the conviction took place, on the warrant having been duly backed or indorsed by a justice of the county where the offence was committed.

Commitments. (*a*)

Defects in warrants of commitment before the enactments in the four recent general acts we have noticed, were a very fertile source of litigation. They should strictly pursue the conviction upon which they are founded. And it was recently decided, that

(*y*) Titles Distress, Commitment and Costs.

(*z*) *R.* v. *Burchett*, 8 Mod. 209; Burn J. tit. Distress, 1 Vol. 1021.

(*a*) See fully, Burn J. tit. Commitment.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

although there had been a valid conviction, yet, that if the commitment were by a small mistake or variation on the face thereof for a different offence, or even if it did not disclose any offence at all, the magistrate who issued the warrant of commitment was liable to an action of trespass, merely on account of such deviation and discrepancy; (*b*) and although there is no *general* act to remedy this hazard in framing a commitment, yet all the four recent acts expressly provide for it by enacting, "that no "warrant of commitment shall be held void by reason of any "defect therein, provided it be therein alleged that the party "has been convicted, and there be a good and valid conviction "to sustain the same." (*c*) In general, before the Court would quash a commitment, they required the conviction to be returned upon certiorari. (*d*) But although all the four acts alluded to, expressly take away a certiorari, so as to prevent the Superior Courts directly removing the supposed conviction, in order to ascertain whether or not there has been a sufficient conviction to support the commitment; yet the Court in which the question respecting the validity of the commitment is under discussion, may ascertain the contents of the conviction, by examining a verified copy. (*e*)

Under the 5 Geo. 4, c. 18. s. 2, it has been very recently decided, that the justice's authority to detain a convicted party must be in writing, and not verbal; and that a detention without written commitment, for a longer time than is absolutely requisite to draw up a warrant in due form, is not authorized. (*f*)

Although usual and proper, yet it seems that a demand of the penalty is not absolutely necessary to precede or be stated in the warrant of commitment, unless expressly required by the statute. (*g*)

Appeal to sessions. (*h*)

If the party convicted think that the conviction was contrary to the *weight of evidence*, or that in cases where the justice had a discretionary power, he has awarded *too large a penalty*, he may *in some cases*, on showing himself to be *a party aggrived*, (*i*) appeal to a higher tribunal, as the sessions, and in

(*b*) *Wickes* v. *Clutterbuck*, 2 Bing. 483; and see other cases, Burn J. tit. Commitment in Execution.

(*c*) 9 Geo. 4, c. 31, s. 36; 7 & 8 Geo. 4, c. 29. s. 77; id. chap. 30, s. 39; and 1 & 2 W. 4, c. 32. s. 45, *all in exactly the same terms.*

(*d*) *R.* v. *Taylor*, 7 Dowl. & R. 622; *R.* v. *Rogers*, 5 B. & Ald. 773; 1 Dowl. & R. 156, S. C.

(*e*) *R.* v. *Mellor*, 2 Dowl. Pra. Rep. 173.

(*f*) *Hutchinson* v. *Lowndes*, 4 B. & Adolph. 118, qualifying *Still* v. *Walls*, 7 East, 533.

(*g*) *Ex parte Edwards*, 8 Dowl. & R. 115; but see *R.* v. *Bucks*, 1 B. & Cres. 485.

(*h*) See in general, Burn J. tit. Appeal; and id. *Poor Law* Index, tit. Appeal.

(*i*) Who is not a party aggrieved, *R.* v. *J. Madden*, 3 B. & Adolph. 938.

effect obtain a *new trial* upon the *merits.* (*k*) But unless an *appeal* be *expressly*, or by the terms of the particular act, *clearly impliedly given*, none is sustainable. (*l*) Thus, in case of a conviction for a common assault or battery before two justices, *no appeal* is given; (*m*) and, although under the 7 & 8 Geo. 4, c. 29. s. 72, and c. 30. s. 38, an appeal lies from a conviction when the penalty exceeds 5*l.*, or the adjudged imprisonment would exceed one calendar month, or when the conviction has been before only one justice, yet when the conviction under either of those acts is for a sum not exceeding 5*l.*, or before two justices, no appeal is given. As there is no *general act* giving or prohibiting an appeal, it is always necessary in each particular case to examine all the statutes relating to the subject, so as to ascertain whether an appeal is or not afforded.

When the party has a right to appeal, he is in strictness bound to know the law; and unless expressly so directed by a particular statute, it is not legally incumbent on the justices to inform him of his right, though they must not mislead; and it may be advisable for them in general to inform the party of his right. (*n*) The defendant however may in *all* cases waive his right to be informed, as by declaring that he will not appeal. (*o*)

Recognizance. (*p*)

In most cases the act giving an appeal imposes as a condition *the terms* of entering into a *recognizance* with *two* sufficient sureties, to abide the judgment of the Court of Appeal, and pay the costs, if any, that may be adjudged; and this, when imposed, is a condition precedent, the performance of which cannot be dispensed with. (*q*) The *form* of recognizance, in the subscribed note, was settled by counsel in a recent case, and may be safely acted upon; and in similar cases the following form of *affirmance* of the conviction and for the costs of appeal, pronounced in the same case by the Court of Sessions, may also be safely relied upon. (*r*)

(*k*) See in general, Burn's Justice, tit. Appeal.

(*l*) 2 T. R. 509; 1 M. & S. 448; 4 B. & Ald. 521; 1 B. & Cres. 64; *R.* v. *Stone*, 6 East, 514; 1 Wightw. 22.

(*m*) 9 Geo. 4, c. 31.

(*n*) *R.* v. *Leeds*, 4 T. R. 583.

(*o*) *R.* v. *Yorkshire*, 3 M. & S. 493; 7 and 8 Geo. 4. c. 29, s. 72, and id. c. 30. s. 38.

(*p*) See in general for full particulars, Burn's Justice, 26th edit. tit. Recognizance.

(*q*) See Burn J. tit. Recognizance.

(*r*) Form of recognizance, on an appeal against a conviction under the Game Act, 1 & 2 W. 4. c. 32.

The parts of Holland, in the County of Lincoln. } Be it remembered, that on the 16th day of February, in the third year of the reign of our Sovereign Lord William the Fourth by the grace of God of the united kingdom of Great Britain and Ireland King, Defender of the Faith, and in the year of our Lord 1833, *J. W.*, of Leverton, in the

CHAP. IV. SUMMARY PROCEEDINGS, &c.

Notice of appeal.

In general there must be a notice of appeal, stating explicitly all the objections to the conviction or proceedings on which the

parts of Holland, in the county of Lincoln aforesaid, farmer, and *W. D. G.*, of Boston, in the parts of, &c. aforesaid, butcher, personally came before me *A. D.*, Esquire, one of His Majesty's Justices of the Peace for the parts of Holland aforesaid, and acknowledged themselves to owe to our said lord the King the sum of 10*l.* each, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements, to the use of our said lord the King, his heirs and successors, if default shall be made in the condition hereunder written. Whereas, by a certain conviction under the hand and seal of me the said *A. D.*, the above bounden *J. W.* is convicted, for that he the said *J. W.*, on Monday the fourth day of the said month of February, did commit a trespass by entering in the day time upon certain lands in the parish of Leverton, in the parts of Holland aforesaid, in the county of Lincoln aforesaid, in the occupation of James Woollerton, the informant in the information upon which the said information was found, in search of game, contrary to the statute in such case made and provided. And whereas the said *J. W.*, hath given notice unto the said James Woollerton of his intention to appeal against the said conviction, and of the causes and grounds thereof. Now the condition of this recognizance is such, that if the above bounden *J. W.* shall personally appear at the next general quarter sessions of the peace, to be holden at Boston for the parts of Holland aforesaid, and shall then and there try such appeal and abide the judgment of the said court of quarter sessions, and pay the costs occasioned by such information, conviction, and appeal, as shall seem meet to and be awarded by the justices at such quarter sessions; then this recognizance to be void, otherwise of force. Taken and acknowledged before me, *A. D.*

Form of judgment of *affirmance* of the sessions, on an appeal against a conviction on the Game Act, 1 & 2 W. 4, c. 32. (*s*)

Lincolnshire, Holland. } At a general quarter sessions of the peace of our sovereign lord the King, held by proclamation at Spalding, in and for the parts of Holland within the county of Lincoln, on, &c. in the year of the reign of our sovereign lord William the Fourth, that now is King of the united kingdom of Great Britain and Ireland, and in the year of our Lord 1833, before *A. B.*, *C. D.*, *E. F.*, and others, their fellows, the justices of our said lord the King assigned to keep the peace of our said lord the King within the parts of Holland aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors done and committed within the said parts in the said county, and one of whom is of the quorum

And afterwards, by adjournment (to wit) at Boston, in and for the said parts, on, &c. in the third year of the reign aforesaid, before *G. H.*, *I. K.*, *L. M.*, and others, their fellows, also the justices of our said lord the King assigned to keep the peace of our said lord the King within the parts of Holland aforesaid, and also to hear and determine as aforesaid, within the said parts in the said county, and one of whom is also of the quorum.

At the same Court so held at Boston, on the day and year aforesaid, *J. W.*, of Leverton, in the parts of Holland, in the county of Lincoln, farmer, entered his appeal to and against a conviction, under the hand and seal of *A. D.*, Esquire, one of His Majesty's Justices of the Peace for the parts of Holland aforesaid, dated and made on the 13th day of February, 1833, for that he the said *J. W.* did, on Monday, the 4th day of February then instant, commit a trespass, by entering in the day time upon certain lands in the parish of Leverton, in the parts of Holland aforesaid, in the county of Lincoln aforesaid, in the occupation of James Woollerton, in search of game, contrary to the statute in such case made and provided; and by which said conviction he the said *A.D.* did adjudge that the said *J. W.* should for the said offence forfeit the sum of two pounds, together with the sum of seventeen shillings for costs, and did order that the said sums should be paid by the said *J. W.* on or before the 20th day of February last, and that in default of payment on or before that day he the said *A D.* did by the said conviction adjudge the said *J. W.* to be imprisoned and kept to hard labour in the House of Correction at Shirbech Quarter, in the parts of Holland, in the county of Lincoln aforesaid, for the space of two calendar months, unless the said sums should be sooner paid; and that the said *A. D.* did, in and by the said conviction, direct that the said sum of two pounds should

(*s*) This judgment of sessions was settled by counsel after examining all the printed and MS. precedents, and with care.

same is founded, and which must be served upwards of the prescribed time; or when the time has not been prescribed, then a reasonable time (usually eight days) fixed by the practice of each session.(t) If the charge in the conviction be general, as under the Vagrant Act, 5 Geo. 4, c. 83, s. 4, the notice of appeal may merely state that the defendant was not guilty of the supposed offence;(u) but in general it must state all the particular objections very distinctly.(v) If the notice be too short, the Court of Sessions should receive the appeal, and respite and adjourn the hearing.(w)

When sessions, quashing conviction, not conclusive.

If the Court of Sessions should erroneously quash a conviction for want of form, that is not an acquittal on the merits, so as to preclude the Court of King's Bench from commanding the sessions, by *mandamus*, to rehear the conviction upon the merits;(x) but where the sessions affirmed a conviction, which afterwards, on *certiorari*, was bad, and it was discovered that the justices had not returned the original correct information to the sessions, the Court of King's Bench refused a *mandamus* to return the original information which had not the defect, or to compel the magistrates to proceed on the original information.(y)

With respect to the costs of appeal, the Game Act, 1 & 2 W. 4, c. 32. s. 44, and other modern acts, expressly give the sessions power to *award costs;* and the concluding words of that section also give authority to the Court of Session to *issue process* to enforce every part of their judgment, affirming the conviction and awarding costs by the like process as the con-

be paid to *P. S.*, being one of the overseers of the poor of the said parish of Leverton, to be by him applied according to the directions of the statute in such case made and provided; and that the sum of seventeen shillings, for costs, should be paid to the said James Woollerton, the informant on the information upon which the said information was founded.

The judgment of affirmance.

Now therefore, at the said Court so holden as aforesaid by adjournment at Boston as aforesaid, upon hearing of the said appeal, it is now here ordered and adjudged by the said Court that the said conviction be, and the same is hereby in all things affirmed; and it is also now here by the same Court further ordered and adjudged that the said *J. W.* be dealt with and punished according to the said conviction; and also that he the said *J. W.* do and shall pay to the said James Woollerton, the said informant, and the respondent in the said appeal, the sum of 10*l.* 3*s.* 2*d.*, the amount of the costs sustained by the said James Woollerton, and by him incurred by reason of the said appeal, and now by the said Court here adjudged to be paid to him by the said *J. W.* according to the statute in such case made and provided.

Costs of appeal.

(t) See fully Burn J. tit. Appeal, and tit. Poor Law, Index, Appeal, and Notice.

(u) *R.* v. *Newcastle*, 1 B. & Apolph. 933.

(v) 10 Bar. & C. 226, 792.

(w) *R.* v. *Wills*, 8 B. & Cres. 380; 2 Man. & R. 401, S. C.; *R.* v. *Lancashire*, 7 B. & Cres. 691; S. P. 10 B. & Cres. 393.

(x) *R.* v. *Ridgway*, 5 B. & Ald. 527; 1 Dowl. & R. 132, S. C.

(y) *R.* v. *Jukes*, 8 T. R. 625; see *R.* v. *Allen*, 15 East, 332; *ante*, 211, 212.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

victing justices might have issued; or if preferred, proceedings might be issued to enforce the recognizance given under the 44th section, and which must have been conditioned for obedience to the decision of the Court of Appeal.

In general, upon an appeal under the 44th section of 1 & 2 W. 4, c. 32, the respondent ought to begin, and to prove the facts of guilt of the trespass over again, precisely as in evidence to the original information, with the exception of the facts mentioned in the 42d section; and either party might give fresh evidence, not even mentioned on the first occasion. (z)

Mandamus to compel justice to state evidence, &c. in conviction, under 3 G. 4. c. 23.

We have seen that if the conviction do not sufficiently state or mistate the substance of the evidence given by the witnesses and not as nearly as possible in the words used by them, and also the defence advanced by the defendant at the time of the hearing, the defendant may, by application to the Court of King's Bench, under the 3 Geo. 4, c. 23, compel the justice to rectify his conviction in this respect. (a) When it is apprehended that the justice has returned or intends to return to the Sessions or to the Court of King's Bench a conviction defective in either of these respects, then the proper course is, antecedent to a motion for a writ of *certiorari*, to apply to the justice in a courteous manner, and even in writing, and to require him to state the evidence correctly; and if any person present at the hearing took an accurate note of the evidence, it would be proper to send a copy thereof to the justice to assist him, and with an intimation that unless the conviction should contain all the evidence correctly, it will be necessary to apply to the Court of King's Bench for a writ of *mandamus;* and a motion to the Court should be made accordingly, and the defendant should be fully apprised of the terms of the final conviction before he moves for a writ of *certiorari;* and if a copy or the necessary information should be withheld, and the defendant thereby fail, he will not have to pay the costs occasioned by the justice's conduct. (b) We have, in the preceding volume, stated the course of proceeding expedient to be observed in cases of this nature, in order to induce the Court to award costs of the proceedings for *mandamus.* (c) In moving for a *mandamus,* it may be advisable to pray that in the mean time all proceedings on the conviction be stayed, so as to prevent any distress warrant or imprisonment in the mean time.

(z) *R.* v. *Commissioners of Excise,* 3 M. & S. 133; *R.* v. *Jeffery,* 1 B. & Cres. 654.

(a) *Ante,* 200, 201.

(b) *R.* v. *Medlam,* 3 Burr. 1720, *ante,* 200, 201, 212.

(c) *Ante,* Vol. 1, 806 to 810.

An *appeal*, we have seen, is a proceeding to obtain a re-hearing of the *merits*, and is in the nature of a new trial, though at a Court of *Sessions*, instead of before only one or two, usually not more than two justices; and we have seen, such appeal can only be had when *expressly* given; whereas a *Certiorari* is in the nature of a *writ of error* removing the conviction (and other proceedings in some cases) from before the justice or from the sessions, before or after the appeal, into the Court of King's Bench, where only objections and defects appearing upon the *face of the conviction* or in some stage of the proceeding can be discussed; and there cannot, in the Court above, be any re-hearing or investigation of the merits, though sometimes affidavits may be heard on each side as to extrinsic proceedings. (*c*)

It is an established general rule, that a *Certiorari* to remove a summary conviction on any reasonable ground into the Court of King's Bench, always lies as a matter of right, unless it has been *expressly* taken away; (*d*) and even where a statute authorizing a summary conviction before a justice gave an appeal to sessions, who were thereby also directed to hear and *finally determine* the matter, it was nevertheless held that these words merely prohibit a re-investigation of the *facts*, and that after the determination of the appeal, the party convicted might remove the conviction by *certiorari;* and Lord Kenyon observed that he thought it was much to be lamented, in a variety of cases, that a *certiorari* was taken away at all. (*e*) The present legislative policy appears from the 9 Geo. 4, c. 31, 7 & 8 Geo. 4, c. 29 and c. 30, and 1 & 2 W. 4, c. 32, to be to take away the writ of *certiorari*, but to allow *an appeal*, on the principle that the latter affords a re-investigation of the *merits* before a Court of General Quarter Sessions, who are supposed to be incapable of deliberate injustice, and who may, as regards any question of law, state a case for the opinion of the Court of King's Bench, and which are adequate opportunities for all fair investigation; and that the writ of *certiorari* is generally a proceeding only to give effect to objection to the form of proceeding. If a statute contain such comprehensive terms as to prohibit the *removal* of any order, matter, or *thing*, the latter word seems to comprehend every act whatever. (*f*) If a conviction contain an adjudication for *several* penalties, any one of which is removable by

(*c*) *R.* v. *Reason*, 6 Term R. 375; *R.* v. *Jukes*, 8 T. R. 542. As to the *rejection* of a *competent* witness, *R.* v. ——, 2 Chitty's R. 137.

(*d*) *R.* v. *Moreley*, 2 Burr. 1040; and per Lord Kenyon, C. J.; *R.* v. *Jukes*, 8 T. R. 544, 5; *R.* v. *Cashiobury*, 3 Dowl. & Ry. 35.

(*e*) Id. ibid.

(*f*) *R.* v. *Middlesex*, 8 Dowl. and R. 117.

certiorari, then the whole conviction is removable, (g) and the Crown is never, by general words in a statute, deprived of this writ. (h)

Where, however, the intention of the Legislature to take away that writ is apparent, though only by implication, then such intention must be given effect to; (i) and when a statute *expressly* takes away a *certiorari*, and the justices have ventured to frame their conviction so formally and sufficiently as upon the face thereof to bring the particular case within their jurisdiction, and unjustly or erroneously to convict, then although from positive affidavits it may be made appear that the *facts* did not justify the conviction; or that they had not any jurisdiction, (and although it is an acknowledged principle that justices cannot give themselves jurisdiction by stating a different offence from that which came before them,) yet Lord Tenterden and the Court held that the statute took away their power to issue a *certiorari* to remove the conviction, or the proceedings or depositions on which the same were founded. (j)

In such a case, and where facts are falsely assumed, the only course is, upon *full affidavits* of the real evidence and defence before the justices, to move the Court of King's Bench for a rule to show cause why a *mandamus* should not issue, commanding them to set out the evidence and defence pursuant to the 3 Geo. 4, c. 23, (k) (but which only applies when no other more succinct form of conviction is allowed by any particular statute,) or if the justice acted wilfully in mistating the evidence to institute criminal proceedings.

It has been suggested, that the Court might prohibit any proceedings upon a conviction, although it might not be removable by *certiorari*; at least, Holt, C. J. said, that upon affidavits on the part of a defendant of a *bonâ fide* defence on the ground of title, and that the justice would not allow any effect to the same, but wilfully persisted in proceeding to convict, the Court of King's Bench might, at any time whilst the conviction remained below and had not been removed by *certiorari*, issue a writ of prohibition after conviction, so as to stay the justice from proceeding to enforce it. (l) And in a case under the General Highway Act, 13 Geo. 3, c. 78. s. 80, which expressly

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(g) *R.* v. *Saunders*, 5 Dowl. and R. 611.

(h) *R.* v. *Anon*, 2 Chitty's R. 136; 5 T. R. 542.

(i) *R.* v. *Liverpool*, 3 Dowl. and R. 275.

(j) *Anonymous*, 1 B. & Adolph. 382.

(k) *Ante*, 200, 201.

(l) 2 Lord Raym. 901; and see *Crepps* v. *Durden*, Cowp. 640, and the note in 1 B. and Adolph. 386 (a).

takes away a *certiorari*, it was held that the same did not extend to cases where the justices at sessions had acted wholly without jurisdiction; and therefore where the justices at petty sessions had made an order for the allowance of the accounts of a surveyor of highways which had not previously been verified before one justice, pursuant to the requisites of the 38th section of the act, it was held that they acted wholly without jurisdiction, and that their order was not a proceeding *had pursuant* to *the act*, and that consequently a *writ of certiorari* lay to remove it into the Court of King's Bench, for the purpose of having it quashed; (*m*) but this seems to be contrary to the usual terms of the enactment, taking away a *certiorari* or *any other* proceeding. (*n*) And in another case under the same Highway Act and session, where an order was made by two justices and confirmed by the sessions for diverting a road, professedly under the authority of, but (as was alleged) without pursuing all the formalities required by the act, it was held that the *certiorari* was still taken away; and after the proceedings had been in fact removed, the Court quashed the *certiorari*, *quia improvide emanavit*, and refused to discuss the sufficiency or insufficiency of the order. (*o*)

Sometimes the statute creating the offence is construed, from its terms, to give either an appeal or a *certiorari*, though not before, and that after adopting one proceeding the party could not resort to another; (*p*) whilst other acts enable a convicted person to adopt both successively within due time, though not both at the same time. In such a case the proper course in general is to appeal in the first instance, and after affirmance to proceed by *certiorari* to reverse the conviction for some defect upon the face of the same.

Time within which certiorari must be moved for, and notice thereof required.

The general act, 13 Geo. 2, c. 18. s. 5, imposes several terms and restrictions before a conviction can be successfully removed by *certiorari*. Thus the writ must be moved for *within six calendar months* next after the conviction, and exclusive of the day of its date; (*q*) nor can the writ be issued until it has been sworn that the party suing out the same hath given *six days' notice* thereof *in writing* to the justice or justices who convicted him, to the

(*m*) *R.* v. *The Justices of Somersetshire*, 3 Dowl. and Ry. Mag. Cases, 273.

(*n*) It is, however, the practice of the Court of K. B. where there has been an unjust or doubtful acquittal of a defendant on an indictment relative to a highway, to stay *the judgment*, so as to prevent any prejudice, and allow the prosecutor another opportunity to convict, though they could not grant a new trial where there has been a verdict for the *defendant*.

(*o*) *R.* v. *Cassim*, 3 D. and Ry. 36.

(*p*) *R.* v. *Eaton*, 2 T. R. 89.

(*q*) 13 Geo. 2, c. 18, s. 5; *R.* v. *Boughey*, 4 T. R. 281.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

end that the latter may show cause against the issuing or granting such *certiorari* in the *first* instance, and upon the motion that it may be issued. If the party have appealed to the sessions against a conviction, he cannot move for a *certiorari* before the Court of Sessions have heard and determined the appeal. (*s*)

Notice of motion for certiorari to remove conviction, and affidavit of service thereof.

The notice of motion must contain a statement on whose behalf the motion is intended to be made, and should be signed *by such party*, and of course must usually be the party who has been convicted; (*t*) and a *certiorari* cannot be issued at the instance of any party who did not sign the notice, although that party has avowedly dropped the proceeding, and it is also too late to give a fresh notice; (*u*) and a notice to justices of a motion to be made for a *certiorari* "on behalf of the church-"wardens and overseers of *S.*," if signed only by one churchwarden, is not a sufficient notice "by the party or parties suing "forth" the writ within the statute, 13 Geo. 2, c. 18. s. 5. (*v*) If two or more persons have been convicted, then all should concur and sign the notice; (*w*) and the service of a rule *nisi* for the issuing of a *certiorari*, although more than six days be thereby given to show cause, will not dispense with the notice; (*x*) and such notice is requisite, although the Court of Sessions has ordered a case to be stated for the opinion of the Court of King's Bench. (*y*).

In order to support the motion to the Court for the writ, there must always be *an affidavit* of a due service of the notice, upwards of *six days* before the day of moving; (*z*) and if in truth the service was defective, that may be shown in answer to the motion, and until the requisition of the statute has been complied with; (*a*) and even where a rule *nisi* for a *certiorari* has been made absolute, and the writ had issued, the Court afterwards set aside the same upon its being established that no sufficient notice had been given. (*b*) The affidavit should be entitled "In the Court of King's Bench," but not in a cause. (*c*)

(*s*) *Semble, R.* v. *Sparrow*, 2 T. R. 196.

(*t*) *R.* v. *Lancashire*, 4 B. and Ald. 289; see *post*, 223, note.

(*u*) *R.* v. *Justices of Kent*, 3 B. and Adolph. 250.

(*v*) *R.* v. *Justices of Cambridge*, 3 Bar. and Adolph. 887.

(*w*) *Semble, sed quære, R.* v. *Cambridgeshire*, 3 B. and Adolph. 887; see *R.* v. *Hunt and others*, 2 Chitty's Rep. 130.

(*x*) *R.* v. *Glamorganshire*, 5 T. R. 279.

(*y*) *R.* v. *Sussex*, 1 M. and S. 631.

(*z*) *Ex parte Nohro*, 1 B. and Cres. 267.

(*a*) *R.* v. *Glamorganshire*, 5 T. R. 279.

(*b*) *R.* v. *Nichols*, 5 T. R. 281.

(*c*) 1 Bar. and Cres. 267; see 2 Stra. 704.

It is advisable, although not apparently expressly required by any enactment, to specify in the notice all the then discovered grounds of objection to the conviction, in the same explicit manner as required in notices of *appeal* against a conviction or against a poor rate assessment. The form of the notice may be as in the note.(*d*)

Affidavit in support of motion for certiorari.

Besides the affidavit of the service of the notice of motion, it is usual, even when a sufficient objection appears on the face of the conviction, to prepare a short affidavit (intituled in the Court of King's Bench, but not in a cause, (*f*) of what the party convicted believes it contains, and of the objectionable points, and (when the facts will justify) of the partiality or irregular expressions or conduct of the convicting justice; and if a copy of a defective conviction has been obtained, it may be annexed and verified by the affidavit. In general, the only objections that will be noticed by the Court, will appear on the face of the conviction; and with respect to those, it would suffice merely to identify the conviction; but sometimes there are also *extrinsic* objections to which the Court might attend, and which in that case should be fully stated in the affidavit; as where the evidence has been improperly omitted, or stated too

Notice, pursuant to 13 G. 2, c. 18, of an intended motion for a certiorari, to remove a conviction. (*e*)

(*d*) To *I. K.* and *L. M.*, Esquires, two of His Majesty's justices of the peace in and for the county of ———, and also to *A. B.*, the complainant and informer in the conviction hereunder specified.

Whereas you the said *I. K.* and *L. M.* did, on the —— day of ——, in the year of our Lord ——, convict me, *C. D.*, for that, &c. [*here state the whole conviction in its very terms*]. And whereas upon hearing of the complaint and information upon which the said conviction was founded, it was duly sworn and proved, upon the oath of ——, a credible witness, that, &c. [*here state the substance of what he swore*]; and whereas there is not, in pursuance of the statute in that case made and provided, any statement in the said conviction of the said evidence; and whereas you also wholly refused to hear the evidence of *G. H.*, a credible witness on my behalf; and your proceedings on the hearing, and your said conviction, were and are irregular and illegal in other respects; wherefore I, the said *C. D.*, have resolved to seek a remedy for the injury which I have received and sustained, and am like to receive and sustain, by means of the said conviction: now I do hereby, according to the form of the statute in that case made and provided, give you and each of you notice, that His Majesty's Court of King's Bench will, in six days from the time of your being served with this notice, or as soon after as counsel can be heard, be moved on my behalf for a writ of *certiorari* to issue out of the said Court, and to be directed to you the said justices [*or if it has, by appeal, become a record of sessions, say*, "to the proper officer of the quarter sessions of the peace," or otherwise to the justices in whose possession it ought to be] for the removal of the record of the said conviction, and all the proceedings upon which the same was founded, and relating to the same, into His Majesty's said Court of King's Bench. Dated this ——— day of ———, A. D. 1834.

C. D. (*).

(*e*) 2 B. and Adolph. 887.

(*) Sometimes the notice is signed by an attorney for his client; but *semble*, the statute requires the party himself to sign the notice; see *R.* v. *Cambridgeshire*, 3 B. and Adolph. 887.

(*f*) 1 B. and Cres. 267.

generally, (g) or where a conviction was for selling otherwise than by Winchester measure, and where a *certiorari* was allowed, because the justice had refused to hear a competent witness for the defendant, viz., the vendee; (h) and when the ground is that the justices had not jurisdiction, the objection must in general be explicitly established by affidavit. (i) The following form of affidavit would suffice. (k)

The grounds on which the Court will grant or refuse a writ of certiorari.

It will be obvious from some of the foregoing observations of the Judges, that they favour the general jurisdiction, to issue writs of *certiorari* for the removal of convictions, unless their power has been expressly taken away; because, under colour of magisterial authority, it has too frequently happened, that convictions have taken place without just grounds, especially those under the Game laws; and that consequently it is desirable that such proceedings should be examinable by the superior Courts. On the other hand, the Court in the exercise of their discretionary jurisdiction, will not interfere to suspend or investigate the sufficiency of summary proceedings before a justice or justices, unless it appear that there is some substan-

(g) 3 Geo. 4, c. 23.
(h) *R.* v. ——, 2 Chitty's R. 137.
(i) *R.* v. *Long*, 1 Man. and Ry. 139. See also *Anonymous*, 1 B. & Adolph. 382.

Form of affidavit in support of application for a certiorari, stating facts and objections, and also swearing to service of the notice of motion.

(k) In the King's Bench.
E. F., of ——, in the county of ——, attorney at law, maketh oath and saith, that by the desire of *C. D.*, labourer, of the parish of ——, in the county of ——, he did, on or about the first day of November last, apply at the house of *I. K.*, of ——, one of the justices of the peace for the county of ——, for a copy of the conviction of the said *C. D.*, made by the said *I. K.* and *L. M.*, Esquires, as two of His Majesty's justices of the peace for the said county, for having, as this deponent hath heard and believes, on the —— day of —— last, at the parish of —— in the county of ——, &c. [*here describe, as explicitly as the facts will warrant, the supposed charge in the conviction*] as contrary to the form of the statute in that case made and provided whereby the said *C. D.* had forfeited and become liable to pay the sum of ——*l.*; and this deponent saith, that on such application as aforesaid, a paper writing, purporting to be a copy of the conviction of the said *C. D.* as aforesaid, was delivered to this deponent by the said *I. K.*, a true copy of which said paper writing is hereunto annexed, and is, as this deponent verily believes, a true copy of the original conviction of the said *I. K.* and *L. M.*; and this deponent further saith, that he this deponent is advised and verily believes, that in the information on which the said conviction was founded, and also the subsequent proceedings thereon, and the same and said conviction are defective and insufficient *in substance*, and wholly invalid, and the said conviction omits the statement of very material evidence given on the behalf of the said *C. D.* before the said justices, relating to the said information. and that the said conviction, on the face thereof, is altogether illegal and void; and this deponent further saith, that he did, on the —— day of ——, deliver to the said *I. K.* and *L. M.* [and also to *A. B.*, the complainant and informer described in the said conviction, three several notices, respectively signed by the said *C. D.*, and a copy whereof is hereunto annexed, stating therein that he the said *C. D.* did intend to move this honourable Court on the first day of Hilary Term next, or so soon after as counsel could be heard, for a rule to shew cause why a writ of *certiorari* should not be issued to remove the said information and conviction, and all proceedings relating thereto, into His Majesty's said Court of King's Bench.
Sworn, &c. *E. F.*

tial objection to the conviction, or such a defect in form that would become dangerous to tolerate or sanction as a precedent. The 3 Geo. 4, c. 23, s. 3, we have seen, aids all *formal* objections where the defendant has appeared and pleaded, and not objected to the same on the hearing; but where the defendant has not pleaded as well as appeared, the statute does not aid. In practice, when the formal objection is aided, the Court of King's Bench will not grant a *certiorari*, unless some substantial defect be suggested; but otherwise, and when by the conviction or affidavit, even a formal defect be pointed out, it is of course to allow the writ, which only brings the conviction before the Court for more formal discussion. The Court has certainly a *discretionary* power and control over the writ, and they will in general require it to be shewn, that some injustice has been done by the convicting justice.(*l*) A defect of jurisdiction, if clearly shewn, is a sufficient cause;(*m*) or the rejection of an admissible witness for a defendant;(*n*) and there are innumerable instances of removal by *certiorari* of convictions, invalid for such informalities as have not been aided by the 3 Geo. 4, c. 23, or other enactment or circumstance.

Recognizance to prosecute certiorari with effect, and pay penalty and costs in case of affirmance.

Immediately after obtaining leave to issue the *certiorari*, the party who issues the same must acknowledge a recognizance in 50*l*. with two sureties. The 5 Geo. 2, c. 19, s. 2, enacts, "that unless the party prosecuting the *certiorari*, and two sureties, enter into a *recognizance* in the sum of 50*l*. each, conditioned to prosecute the *certiorari* at his own proper costs and charges with effect, without wilful or affected delay, and to pay the amount of the adjudication in case of *confirmance* within one month afterward, then the justice or justices may proceed to enforce the conviction, as if the writ of *certiorari* had not been allowed." The defendant, as well as each of the sureties, must respectively be bound in the sum of 50*l*., and 25*l*. for each of the sureties will not suffice. (*o*) If there be several defendants, and all do not enter into the requisite security, it seems to have been doubted whether the recognizance of one of the parties and his sureties will enable him to prosecute a *certiorari*. (*p*) No party can require the convicting justice to make his return of the conviction, until after he has duly entered into the requisite recognizance. When

(*l*) *R.* v. *Bass*, 3 Term R. 252.
(*m*) Id. ibid.; *R.* v. *Long*, 1 M. & R. 139.
(*n*) *R.* v. ———, 2 Chitty R. 137.
(*o*) *R.* v. *Boughey*, 4 T. R. 281; *R.* v. *Dunn*, 8 T. R. 217.
(*p*) Hawk. B. 2, c. 27, s. 50; Com. Dig. Certiorari; *Kent* v. *Goldshaw*, 7 B. & Cres. 525; 1 Man. & Ry. 305, S. C.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

under the now repealed game laws, a bond was required instead of a recognizance, it was even doubted whether the bond must not have been executed before the motion for a *certiorari* was made. (*q*)

Of affirmance, or quashing the conviction in K. B.

When the record of the conviction has been returned, its validity is brought under formal discussion, by the case being inserted in the crown paper, and argued on certain days called crown paper days, in due order, as the same stands in such paper. If the conviction be affirmed, then the defendant under the terms of his recognizance will have to pay the costs, unless, as we have seen, he has been induced to remove it in consequence of the magistrate's refusal to give him a copy. (*r*) Where the Court find that the sessions have quashed a conviction for a supposed defect in form, without hearing the appeal on the merits, and their order was removed by *certiorari;* the Court of King's Bench being of opinion, that there was not any defect even in form, quashed the order, and sent back the case to the sessions, to enter continuances and hear the appeal on the merits. (*s*) If the Court of King's Bench should quash the conviction, the defendant is entitled to have his recognizance or his bond discharged; but he cannot recover any costs upon a decision in his favour on a writ of *certiorari,* though we have seen that if he succeed at the sessions on *an appeal,* he is entitled to his costs. On first view it may seem unjust, that a defendant who has been harrassed by the vexatious proceeding, should not have any means of recovering his costs from the informer, as well for proceedings by *certiorari* as appeal, when he ultimately succeeds: the reason for the distinction is, that on the *appeal* the defendant succeeds on *the merits,* and therefore ought to have his costs from the complainant; but when he succeeds on a *certiorari,* it is probably on account of the inaccuracy of the justice, and for which it might be hard to make the informer pay. It is however of little avail to attempt to assign reasons for the distinction, and sufficient to know that the law is thus positively settled.

Execution to enforce a conviction after it has been affirmed.

In general when a conviction has been affirmed, it is the course to enforce payment or execution, by an appropriate execution out of the Court of King's Bench. (*t*)

(*q*) 8 T. R. 218.
(*r*) *R.* v. *Midland,* 3 Burr. 1720.
(*s*) *R.* v. *Ridgway,* 5 B. & Ald. 527.
(*t*) Lord Raym. 768; 1 Salk. 378; Carth. 231.

CHAP. IV.
SUMMARY PROCEEDINGS, &c.

Liability of complainant or informer.

The general rule is, that if a party *bona fide* supposing that he has a well founded charge against another, and not taking the law into his own hands, by *himself* apprehending the party or causing others to do so, goes before a Justice of the Peace, who is supposed to know the law, at least as regards his own jurisdiction, and states the facts according to the best of his knowledge, and *without malice*, then he is not liable for any imprisonment or other annoyance, to the party under the *subsequent* proceedings authorized by the justice, although it finally appear, that in truth the charge and proceeding was wholly unfounded; for otherwise men would be deterred from bringing forward charges of a criminal nature, which, although less than felony or indictable misdemeanor, it may nevertheless be important to have prosecuted; and though the proceeding would necessarily occasion some trouble, if not positive injury to the party, yet the complainant having to pay costs *pro falso clamore*, is considered adequate punishment. (*v*) This was always the doctrine as to unfounded *civil* suits, unless where the proceeding had unnecessarily been by vexatious *arrest*. (*w*) But if a *party maliciously* without reasonable cause, obtain a search warrant or other process against the person or goods of another, and thereby occasion inconvenience or expence, he will be liable to a special action on the case for his malicious imputation and all its natural consequences. (*x*) Thus where a person having lost a bill of exchange, which he supposed to have been stolen, went before a magistrate and correctly stated the circumstances of the loss, and thereupon the justice issued his warrant to apprehend *A. B.* on a charge of having "*feloniously* stolen, taken, and carried away" the bill of exchange, (language which the complainant did not use when he laid his information), and upon subsequent investigation of the case, it turned out to be no felony; it was held that no action on the case could be supported against the accuser for *maliciously* procuring the magistrate to grant his warrant, because to sustain the averment of malice, the charge must have been wilfully false. (*y*) So where a party, under the Wilful and Malicious Trespass Act, before a justice, charged his tenant with cutting down a tree on the premises occupied by him as tenant, which was the fact, but the justice having erroneously considered this act

(*v*) *Ante*, 207; 18 Geo. 3. c. 19.
(*w*) 1 Salk. 14.
(*x*) *Cohen* v. *Morgan*, 6 Dowl. & R. 8; *Mills* v. *Collett*, 6 Bing. 85; *Elsee* v. *Smith*, 1 Dowl. & R. 97; 2 Chit. Rep. 304, S. C.; *Hensworth* v. *Fowkes*, 4 B. & Adolph. 449.
(*y*) Id. ibid.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

to be a *felony*, and committed the tenant to prison as a felon; it was held, that the landlord was not liable to any action for such illegal imprisonment by the justice. (z) But where the defendant maliciously stated, without any reasonable ground for so doing, that he suspected that the plaintiff had feloniously stolen and concealed wood on his premises, and thereby induced the justice to issue a search warrant; it was held that such groundless accusation subjected the accuser to an action on the case, although as the warrant was illegal, the magistrate was liable to an action of trespass. (*a*)

Liabilities of justice. (*b*)

The *liabilities* of justices and inferior officers, and their *protections*, constitute very frequent subjects of legal discussion. A mere warrant or conviction, *not acted upon* or enforced against the person or property of another, not being actually prejudicial, could not be the subject of complaint; but when *without or beyond* the justice's *jurisdiction*, he *irregularly* causes the property or person of another to be imprisoned, then the justice is liable to an action; generally of trespass, but after a conviction has been quashed, then an action on the case, as presently stated.

The principal instances of illegal proceedings before conviction, where a justice, or inferior officer, is liable to an action, are cases of apprehension of a party without a sufficient *oath* of a crime or offence having been committed; (*c*) or where a constable has, after apprehension, neglected to take the party before a justice within a reasonable time; (*d*) or where a justice has kept a party in custody too long, under pretence of re-examination; (*e*) or has before conviction been guilty of any other unauthorized act, (*f*) or has committed a person as a vagrant without personally hearing the witnesses in the presence of the party. (*g*)

After conviction, a justice was always considered liable if he issued a *commitment* for a different offence than that expressed in the conviction, (*h*) or where the commitment did not show on the face of it a sufficient conviction. (*h*) We have, however, seen that the four late acts, 9 Geo. 4, c. 31, s. 36, 7 & 8 Geo. 4, c. 29, s. 73, *id.* c. 30, s. 39, and the Game Act, 1 & 2 W. 4, c.

(z) *Mills* v. *Collett*, 6 Bing. 85; 2 Man. & Ry. Mag. Cases, 262.

(*a*) *Elsee* v. *Smith*, Chitty's R. 304.

(*b*) See also some of the instances of liability and non-liability of justices, 1 Chitty on Pleading, 89, 90, 209 to 215.

(*c*) *Morgan* v. *Hughes*, 2 Term R. 225; but see *Mills* v. *Collett*, 6 Bing. 85.

(*d*) *Ante*, 1 Vol. 633.

(*e*) *Ante*, 178, 9.

(*f*) Id. ibid.

(*g*) *R.* v. *Constable*, 7 Dowl. & Ry. 663.

(*h*) *Wickes* v. *Clutterbuck*, 2 Bing. 483; *Rogers* v. *Jones*, Ry. & Mood. 129; 2 Dowl. & Ry. Mag. Cases, 429.

32, s. 45, expressly enact, "that no warrant of commitment shall "be held void *by reason of any defect therein, provided it be "therein alleged that the party has been convicted, and there be "a good and valid conviction to sustain the same.*" And it has been held, that although these acts prohibit the removal of the conviction by *certiorari*, yet in support of a commitment the contents of the conviction may be ascertained by obtaining a verified copy of the same. (*i*) But except in these protected cases, if the warrant, either to seize goods or illegally detain the person, be defective, the justice may be sued, and usually in trespass.

Sometimes also a justice may be liable in *trespass*, because the *facts* did not bring a case within the statute on which he has proceeded, as the statute giving summary jurisdiction over particular servants working for wages, but not over persons working by *contract*; and if he should commit the latter, it would be false imprisonment, (*k*) because the *facts* did not warrant his interference; as where the justice granted a warrant to distrain on a party who had no land in the parish, (*l*) or convicted a party for not doing statute duty in consequence of his supposed occupation of lands within the parish which he did not occupy; though it would be otherwise, if he merely relied upon a personal exemption, which he ought to have established before the justices antecedent to conviction. (*m*)

But when a conviction is legal, and sufficient on the face of it, and the warrant of commitment or distress or other execution thereon is not in itself defective, then unless the conviction has been quashed, it constitutes a complete defence and protection to the justice for any thing done upon it, however irregular or unjust the conviction may have been as regards the merits; (*n*) so that if a justice should take care to draw up a formal conviction technically correct, although quite contrary to the merits, it cannot be impeached in an action of trespass, and he may thereby protect himself from liability to any action, and could only be proceeded against by *mandamus* to compel him to *reform* his conviction, or by criminal information if his conduct should have been wilfully and grossly incorrect. (*o*) Thus where two magistrates having, at a landlord's request, given possession of

(*i*) *R.* v. *Mellor*, 2 Dowl. Prac. Rep. 173.

(*k*) *Lancaster* v. *Greaves*, 9 Bar. & Cres. 628; *Hardy* v. *Ryle*, id. 603; *Branwell* v. *Penneck*, 7 Bar. & Cres. 536.

(*l*) *Weaver* v. *Price*, 3 Bar. and Ad. 409.

(*m*) *Fawcett* v. *Fowlis*, 7 B. and Cres. 394.

(*n*) *Ante*, 196, note (*w*); *Archroft* v. *Brown*, 3 Bar. and Adolph. 684.

(*o*) *Fawcett* v. *Fowlis*, 7 B. and Cres. 394.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

a dwelling-house as deserted and unoccupied, pursuant to 11 Geo. 2, c. 19, s. 16, but afterwards the judges of assize, on appeal under that act, made an order for the restitution of the farm to the tenant, with costs, and the latter brought an action of *trespass* for the eviction against the magistrate and the constable and the landlord; yet it was held, that *the record of the proceedings* before the magistrates was an answer to the action on behalf of all the defendants, and not confined merely to the justices. (*p*)

Protection to justices. (*q*)

The *general* acts, 7 Jac. 1, c. 5, 21 Jac. 1, c. 12, 24 Geo. 2, c. 44, (*r*) and 43 Geo. 3, c. 141, afford magistrates very considerable protection; and there are frequently local acts of the same nature. The 24 Geo. 2, c. 44, s. 8, requires the action to be brought within six calendar months, and, as we have seen, a calendar month's previous notice of action; (*s*) and during which the same act enables the justice to tender amends; or if he negtect to do so before the writ is issued, he may pay money into Court, (*t*) and this at any time, even just before the trial; (*u*) and the *venue* in the action must be laid in the proper county where the alleged injury was committed, and the defendant may plead the general issue, and give in evidence any ground of defence under that plea.

As regards the *form* of action, there is also a singular enactment in 43 Geo. 3, c. 141, s. 2, requiring that in an action against a justice for any thing by him done in endeavouring to enforce a conviction, *if such conviction has been quashed*, the *declaration* shall be in case for *maliciously* doing the act complained of, and that otherwise the plaintiff shall not recover more than two pence, nor *any* costs; the object of which enactment was to prevent the plaintiff, in case of a *quashed* conviction, from recovering against a magistrate, unless he proved that he acted not merely *illegally*, but also *maliciously*, and without reasonable or probable cause, and so as to prevent a party from succeeding in an action merely on account of an error in the justice's conviction. But the latter enactment is strictly confined to cases where a *conviction* has been *quashed*. (*v*) It should seem, therefore, that when a conviction, as well as a warrant of

(*p*) *Archroft* v. *Browne and others*, 3 Bar. and Adolp. 684.

(*q*) See in general 1 Paley on Convictions, 18 and 19, in note.

(*r*) See statutes, *ante*, 1 Vol. 506, note (*a*); see *ante*, 63, as to notices of action to a justice.

(*s*) See *ante*, 63, &c. as to notice of action.

(*t*) *Ante*, 1 Vol. 506.

(*u*) *Nestor* v. *Newcomb*, 3 Bar. and Cres. 159.

(*v*) *Massey* v. *Johnson*, 12 East, 67; *Gray* v. *Cookson*, 16 East, 13; *Rogers* v. *Jones*, Ry. and Mood. 129; 2 Dowl. and R. Mag. Cas. 429.

distress or commitment, are already substantially bad upon the face of them, and the justice has made an unlawful seizure or imprisonment under the same, the better course for the party convicted is *not* to proceed to get the conviction quashed, but to proceed at once in an action of trespass.

Supposing a justice has exceeded his jurisdiction by erroneously committing a party to prison, (as under the 3 Geo. 4, c. 71, called Martin's Act, against cruelty to animals, or any other statute for a supposed offence not within the statute,) the Court will discharge the party imprisoned upon *habeas corpus*, without imposing any terms whatever that no action shall be brought. (*w*)

OTHER SUMMARY PROCEEDINGS.

Having thus fully considered the very usual summary proceedings before justices for conviction, we will now examine some of those proceedings by justices of a more limited nature, but yet occasionally called for and of considerable importance, especially those relating to *forcible entries and detainers*, and cases that arise between *landlords and tenants*, and which demand *immediate* remedy; and where the ordinary process of law would be either futile or too expensive, as where rent is in arrear and the premises are deserted, and no sufficient distress to be found; or where there has been a fraudulent removal of goods to prevent a distress; or where paupers have been permitted to occupy in that character, and afterwards refuse to give up possession; and on behalf of tenants upon whom distresses have been made, and excessive charges insisted upon.

THIRDLY, IN CASES OF FORCIBLE ENTRY OR DETAINER.

The right of Justices of the Peace to interfere in cases of *forcible entries and detainers* is of very ancient date; but as regards justices acting summarily, either separately or otherwise than with reference to an indictment at sessions or assizes, is entirely founded upon different *statutes*. At common law a party might always enter and take possession of his own house or land, though limited to twenty years by the statute 21 Jac. 1, c. 16, provided he could do so in a *peaceable manner*, and which was defined by an ancient statute, (5 Rich. 2, c. 8), "not with strong hand nor with multitude of people, but "only in a *peaceable and easy manner*." But at common law as well as under the statute presently noticed, if a person took

(*w*) *Ex parte Hill*, 3 Car. and Pa. 225; and *ante*, 1 Vol. 689.

possession even of what was clearly his own property, with *strong hand* or in a *forcible* manner, he was indictable at the Court of Sessions or at the Assizes, because such *forcible entry* constituted in fact a breach of the peace, which was considered an offence to society which ought to be repressed; and it was always a maxim as regards the right to a house or building in particular, that although the owner might if the outer door were open, or even if shut, by any stratagem obtain possession in a *peaceable manner,* or if no person were therein, might even break open the outer door of a house and take possession of his own; (*x*) yet that he could not do so, when he could not effect that object otherwise than by *personal* violence, as by assaulting the occupier and turning him out, or going to the house (some person being therein), with several persons armed with fire-arms, swords, or other weapons of attack, and then attempting to force possession; because such a proceeding endangers the peace, and might occasion bloodshed; and the owner in such a case ought to wait the result of legal proceedings, and after recovering judgment therein, then a writ of *habere facias possessionem* might be issued thereupon, directed to the sheriff of the county, and whose duty would thereupon be to take the *posse comitatus*, and compel the delivery of possession; and if the occupier should thereupon resist, he would become criminally punishable for resisting the process of the law; and in case after the sheriff had put the owner into possession, the wrongdoer should return and retake possession shortly afterwards, without any new right of possession having accrued in his favour, then the Court would from time to time issue fresh writs to the sheriff, commanding him to re-deliver possession, and the party would also be committed for his contempt of the process of the Court. (*y*) So that a party, although clearly having the right of possession, would absurdly be guilty of dangerous precipitancy, if he should attempt to take possession by force, where there would be any risk of personal conflict, or of what would in law amount on his part to a forcible entry, and which would subject him at *common law* to an indictment for a forcible entry, and to the proceedings we will presently notice; and this, although he might really be entitled to the exclusive possession. (*z*) We have in the preceding volume

(*x*) So decided in *Turner* v. *Meymott*, 1 Bing. 158; 7 J. B. Moore, 574; *Taunton* v. *Costar*, 7 T. R. 431; 6 Taunt. 282; 8 Bar. and Cres. 4.

(*y*) Tidd's Prac. 9th ed. 1247; and *Doe* d. *Thompson* v. *Mirehouse*, 2 Dowl. Prac. Rep. 200.

(*z*) *Ante*, 1 Vol. 375, 401, 646; 8 Term Rep. 299, 357.

suggested the best course of proceeding in ordinary cases, to regain possession of a house and land, and how a party may *safely act* in taking or retaking possession, without the assistance of a justice. (*a*)

Prevention of waste, pending legal proceedings.

If it should appear that possession cannot be obtained without the risks to which we have adverted, then if the title be *legal*, an action of ejectment must be prosecuted; or if equitable, then a Court of Equity must be resorted to; and in the mean time, if it be apprehended that *waste or wasteful trespasses*, such as cutting trees, digging mines, &c., are about to be committed or repeated, then we have seen that a bill in Chancery should be immediately filed, and the Court moved, and within a few days an *injunction* to prevent injury may in general be obtained. (*b*)

Jurisdiction of justices, in cases of forcible entry and detainer.

But we are now to consider the very important summary jurisdiction of justices in cases of *forcible entry or forcible detainer*. This, we have seen, is founded entirely on the statute law, viz. 5 Ric. 2. c. 8, 15 Ric. 2. c. 2, 8 Hen. 6. c. 9, 31 Eliz. c. 11, 21 Jac. 1. c. 15; the latter of which principally extends the summary remedy to copyholders and tenants for years. The material parts of those acts are stated and commented upon in Burn's Justice, title Forcible Entry and Detainer; but as there are some observations in that in general accurate work, calculated to mislead, we will here take a concise view of at least some of the most important parts of this subject.

There are two descriptions of *forcible ousters*, which are perfectly distinct from each other, viz. 1st, a *forcible entry* and expulsion, with a continuance of similar force; and 2dly, a forcible detainer, where the previous entry was not forcible, but illegal. It would here be beyond our inquiry to consider who may or not be guilty of a forcible entry or detainer. The general rule is, that all persons *compos mentis*, and who might in fact commit any crime, may be guilty of this offence; and that consequently an infant, or even a married woman, (*c*) may be liable to be proceeded against summarily by a justice. But in general mere *subsequent assent* to a forcible entry, although for the party's use, would not subject him to such a criminal

(*a*) *Ante*, 1 Vol. 646, 7.

(*b*) See *Ex parte Clegg*, *ante*, 1 Vol. 723, 4, 726, 7.

(*c*) *R.* v. *Smyth and others*, Mood. and Robinson's Rep. 155, and even by forcibly entering into her husband's dwelling-house.

proceeding. (*d*) To constitute a forcible entry, or a forcible detainer, mere force *in law*, as it is technically termed, being a simple trespass, is not sufficient, but there must be some *actual violence*, or some proceeding, as a *large assembly of persons*, calculated to create *alarm*, if not *terror*, in ordinary minds, though it is not necessary that there should be any assault or battery. (*e*)

Forcible entries, and forcible detainers after *such* entries.

With respect to *Forcible Entries*, followed or not by continued forcible Detainer, all the above statutes apply. The 5 Ric. 2. c. 8, defines and prohibits forcible entries, and the 15 Ric. 2. c. 2, gives jurisdiction to one or more justices. It enacts, that one or more justices shall, *upon complaint*, (and which it seems may be by any one, though not aggrieved, (*f*)) go to the premises, "and if he or they *find* any that hold "such place forcibly after *such* (i. e. *forcible*) entry made, they "shall be taken and put to the next gaol, there to abide convict by the record of the said justice or justices, until they "have made fine to the king;" and the statute requires all persons to aid and assist the justice in his proceeding. Under this act, and according to the present law, if the justice, when at the premises, do not actually have *view* of any *continuing* force, he *cannot proceed;* and supposing that the parties have been guilty of a previous forcible entry, but the continuance of force has ceased, it should seem that they can only be punished by indictment at the sessions or assizes, or a jury must be impannelled to try the *forcible entry* under the 8 Hen. 6. c. 9. s. 3. This may be collected from the terms of the act, 15 Ric. 2. c. 2, and from the authorities; which state that "if such offenders "being in the house at the coming of the justice shall make no "resistance, nor make shew of any force, then the justice himself "cannot arrest or even *remove* them at all upon such view," (*g*) though if the force be found afterwards by the *inquiry of the jury*, under the 8 Hen. 6. c. 9. s. 3, then the justice may bind the offenders to the peace; and if they be gone, he may make his warrant to take them, and may after send them to the gaol until they have found sureties for the peace. (*h*) But this power of committing a party upon a subsequent finding, and otherwise

(*d*) Hawk. P. C. ch. 64, s. 24; Co. Lit. 199 *b*, 200 *a*.

(*e*) Hawk. P. C. ch. 64, s. 20, to s. 29; Comyn's Digest, title Forcible Entry, A. 3; *R.* v. *Wilson*, 8 Term Rep. 357; *Milner* v. *Maclean*, 2 Car. and Pa. 17.

(*f*) Lamb. 147.

(*g*) Dalt. Just chap. 44; and see 8 Hen. 6, c. 9, s. 3, which implies that unless the justice *himself view* the *force*, he cannot restore possession.

(*h*) Dalt. Justice, ch. 44.

than upon the justice's own view, seems questionable. (*i*) If upon the justice's arriving at the premises, the doors be shut, and those within the house should deny the justice to enter, he may order an outer door to be broken open in his presence, and may enter to remove the force; (*k*) and if after such entry has been made, the justice shall find such force, he shall cause the offenders to be arrested, and shall also take away their weapons, it is said also their armour, and cause them to be appraised, and after to be answered to the King as forfeited, or the value thereof. (*l*)

If the justice himself should have *actual view* of the force *continued* in his presence, then he is to draw up within a reasonable time, his record, and fix a fine separately upon each offender, (*m*) and issue his warrant of commitment unless such fine be paid; (*m*) or unless the defendant traverse the force, in which case a jury is to be impannelled, and who must find the same original forcible entry, and the justice's view of its continuance. (*n*) If the defendant traverse the force, then until the jury have found their verdict confirming the finding of the justice, he is not to restore possession. (*o*) And before the jury, the party claiming restoration of possession would not be a competent witness. (*p*)

Proceedings, in case there is no continuance of the force in view of the justice.

If there should be no continuance of the force in the view of the justice, then, as we have seen, he could not restore possession; and therefore it was found that many offenders took care to avoid all appearance of force in the presence of the justice, and thereby still maintained their possession, and ousted the party injured of his summary remedy. To prevent that injustice, the

(*i*) Hawk. P. C. ch. 64, s. 8.

(*k*) Dalt. J. ch. 44.

(*l*) Dalt. Justice, c. 44. In a case fully advised upon, by Sir Vicary Gibbs and Mr. Serjeant Shepherd, where a *lessee held over* after he had forfeited his lease by several breaches of covenant, and was committing waste after notice of his forfeiture and demand of possession, an active justice of the peace for the county of Essex, with two regular constables, in strict observance of those opinions, went to the premises, and after stating that he was a justice of the peace for the county, and that the lease was forfeited, and the right to possession vested in the landlord, demanded admittance; and being refused, the justice then stated the substance of the enactment, subjecting persons guilty of a forcible detainer to fine and imprisonment, and giving power to a justice to deliver possession to the landlord; whereupon a person from within stated they had fire-arms, and would use them if any attempt should be made to take possession. Upon which the justice ordered the constables instantly to force the outer door, which was done, and possession given to the landlord; and as all the persons within engaged to retire peaceably, the justice only took their recognizance to appear at the sessions.

(*m*) 2 Stra. 794; *R.* v. *Ellwell*, 2 Lord Raym. 1514; Paley, 190; *Leighton's case*, 1 Hawk. B. 1, ch. 64, s. 8; Dalt. ch. 44. Separate fines must be fixed, or the proceedings will be irregular.

(*n*) 3 Salk. 169.

(*o*) Id. ibid.

(*p*) *R.* v. *Williams*, 9 B. and C. 549; *R.* v. *Bevan*, R. and M. N. P. Cases, 242.

subsequent act, 8 Hen. 6. c. 9. s. 3 & 4, enacts, "And moreover though such persons making such entry be present, or "else departed before the coming of the said justices or justice, nevertheless the same justices or justice shall have authority and power to inquire, by people of the same county, "as well of them as make such forcible entries, as also of them "that holdeth with force, and the jury shall find that the parties had offended against the statute, then the justice shall "put them out, and restore the person forcibly disseised."

Forcible detainers.

2. *Forcible Detainers.*—Before the 8 Hen. 6. c. 9. s. 2, there was no summary remedy to obtain the restoration of possession, unless there had been a *forcible entry;* though in one case it was held that a peaceable entry during the short absence of the occupier, and then upon his quick return *excluding* him, was equivalent to a forcible entry. (q) But it was found that many cases of *forcible detention* occurred, which equally required summary legal redress; as where the parties who committed the forcible entry afterwards quitted, and either sold or peaceably gave up the possession to a different person, who entered; or a party intruded into land or buildings during the absence of the owner or occupier; or, as Hawkins supposes, where a lessee wrongfully held over after the expiration of his lease. It was formerly supposed, and it should seem correctly so, as respects a mere case of holding over, that cases of that description did not require such *immediate* summary assistance, because there had not been any *actual* breach of the peace committed by the present wrong-doer in taking possession, as in the case of a *forcible entry,* nor was his continuance in possession necessarily any actual breach of the peace by him; because, unless the true owner should himself attempt to resume possession otherwise than by legal process, no force would be *used,* even when arms were kept in the house by the party for the protection of the occupier, or even for forcibly retaining possession. The statute 8 Hen. 6. c. 9. s. 1, nevertheless, certainly principally having in view cases of forcible entry, and of the party guilty of it handing over the possession to a third person, after reciting, "and for that the said statute (alluding to the 15 Ric. 2. "c. 2), doth not extend to entries in tenements in *peaceable* "manner, and after holden with force; nor if the persons "which enter with force into lands and tenements be removed "and avoided before the coming of the justice, and that in

(q) 1 Russ. Crim. L. 287; Hawk. ch. 64, s. 26.

"consequence many *wrongful and forcible entries* be made, "&c." (r) then enacts, "that the statute shall extend to persons *holding forcibly*, and that upon complaint of the *party* "*aggrieved*, the justices or justice shall cause the statute to be "executed at the costs of such party grieved." But this statute throughout appears to refer either to cases where a previous *forcible entry* had been committed by some one, or at all events to a case where the wrong-doer, alleged to be guilty of the forcible detainer, was at the *same time wrongfully and illegally* in possession, and the statute, s. 7 (afterwards enforced by 31 Eliz. c. 11. s. 2), expressly precludes the justices from acting, when the person forcibly detaining has been in possession continuously for three years.

The construction of this act in Burn's Justice, title Forcible Entry and Detainer, VI., has tended to mislead; for it is there laid down "that even in cases of *forcible detainer*, the justice "is, upon complaint of the party grieved, (*without any exa-* "*mining or standing upon the right or title of either party*,) "to take sufficient power of the county and go to the place "where such force is made, and &c." This position, in its application to *forcible entries*, is perfectly correct, because no man ought to assert a claim in so violent a manner; and in that case his right is not to be inquired into; (s) but in its application to a mere alleged *forcible detainer*, it is decidedly incorrect. If it were sustainable to its full extent, then if any party should think fit to claim the possession of a house in the lawful occupation of another, and the occupier, confident in his own just right, should refuse to deliver it, and actually defend the same, then any justice might be required to go to the place and request the occupier to give up possession; and if the latter should refuse to quit, and fasten all the outer doors, the justice might treat him as an offender, and fine and commit him to prison, and give possession to the claimant, although he had no pretence of title. This would be a most dangerous jurisdiction, especially if, as supposed by Dr. Burn, the justice is not to inquire or consider the right or title of either party; and yet, according to the doctrine referred to, a justice would be bound, without inquiring into the title, to turn out every person so exceedingly uncivil as not to quit instantly upon the justice's request. Neither could

(r) *Semble*, that these and other words in 8 Hen. 6, c. 9, import strongly that the *principal*, if not the only object of the act, was to provide for cases where *originally* there had been a *forcible entry*. The authorities, however, have given a more extensive construction, and apply to a lessee holding over; Com. Dig. Forcible Detainer, B. 2.

(s) Per Vaughan, B. in *R.* v. *Williams*, as stated in Dick. Sess. by Mr. Serj. Talfourd, 239.

it have been the intention of the Legislature to impose upon a justice the difficult office of deciding upon the title of either party; and if it was intended to permit interference in other cases than those where there had been originally a *forcible entry* by *some one* within three years, still it must at least have been intended to limit their jurisdiction to very clear and obvious cases of *illegal withholding* possession from the true owner.

It is, however, laid down also by Serjeant Hawkins, that there may be a forcible detainer, whether the entry were forcible or not,(*t*) and that if a lessee, after the end of his term, keep arms in his house to oppose the entry of the lessor, though no one attempt an entry; (*u*) or if a tenant at will should *detain with force* after the will has been determined, he will be guilty of a *forcible detainer*, and that so would a lessee resisting with force a distress for rent; or even, it is said, forestalling or rescuing the distress; (*v*) and it is also laid down, that if a mortgagor detain with force after the mortgage has become forfeited, that is a forcible detainer, though it is at the same time admitted that the mere denying possession in these cases would not amount to a forcible detainer. (*w*) It may be asked how is it certain, in the first two cases, that there may not have been a valid agreement for a new tenancy; or in the last, that the mortgagee had not agreed that the mortgagor should continue in possession as his tenant; and yet it is supposed that this is immaterial, and that the justice must proceed; and yet it is admitted, that at one stage of the indictment for a forcible entry, the continuance of the right of the prosecutor may be inquired into; and it is said that if such interest has ceased, the defendant may apply to the Court to quash a writ of restitution, or at least prevent its execution. (*x*)

In one of the most recent cases, it has been decided that at all events the 8 Henry 6. c. 9, was only intended to give a summary jurisdiction in cases of forcible detainers after an *unlawful entry*; and that a conviction by justices on that statute, merely stating *an entry* and a forcible detainer, not averring that such *entry* was *illegal*, was insufficient; (*y*) and Denman, C. J., said, "I "cannot think that the Legislature meant that the act of a man "in maintaining his own rightful possession with force against

(*t*) Hawk. P. C. ch. 64, s. 22; Burn J. Forcible Entry and Detainer, iii.

(*u*) And see MS. case, *ante*, 235, note (*l*), where Sir V. Gibbs and Mr. Serjeant Shepherd were of opinion that the statute extended to a lessee holding over.

(*v*) Com. Dig. Forcible Detainer, B. 2; *sed quære*.

(*w*) Id. ibid.

(*x*) Burn J. tit. Forcible Entry and Detainer, V. 26th edit.; 2 Vol. 797.

(*y*) *The King* v. *Oakley*, 4 B. and Adolph. 307; and 1 Nev. and Man. 58, S. C.; but see Cro. Jac. 19, 32, 151.

" a wrong doer should authorize the justices to turn him out;"(z) and Parke, J. stated the inclination of his opinion to be "that " the statute only applied when the *original entry* was unlaw- " ful;" and he observed that it would not necessarily follow from that decision that the statute 8 Henry 6. c. 9, does not apply to the case of a tenant at will or for years holding over after the will has been determined, or the term expired, because the continuance in possession afterwards *may* amount in judgment of law to a *new* entry; and as to that point, he referred to Hawk. P. C., book 1. c. 64. s. 34. Taunton, J. expressed his opinion, that the statute Henry 6 only applies to a forcible detainer preceded by an *unlawful entry;* and Patteson, J. also considered that an *illegal entry* was essential, and that if the statute were not confined to such cases, the consequence would be that a person who had even two years rightful possession of land might be liable under any circumstance to be fined and imprisoned for forcibly maintaining that possession against a wrong doer. He also observed that there might be good reasons for confining the summary jurisdiction of justices to cases where there had originally been a *forcible entry*, for it might be hard to allow a man to be turned out of possession by so summary a course, for detaining with force that land to which he might be rightfully entitled. (*a*)

It will be observed, that in this case the judges abstained from deciding upon a case of a tenant *holding over*, or upon any case where the original entry was lawful, though the continuance in possession might, by a subsequent act, have become illegal. As in the latter case there probably would not have been any *actual breach* of the peace, but at most a civil injury, by withholding possession from the claimant, and the legality of which may be properly tried in an action, the case seems not to be properly within the *object* of the jurisdiction of justices; and as they are not in general competent to decide upon title to land or upon questions respecting the creation, construction, or duration of a lease or agreement, or other contract relating to the possession of houses or land, it would be at least injudicious for justices to adopt summary proceedings, and more prudent to leave the parties to try the right in a civil action, and to confine the exercise of their summary jurisdiction to cases of *recent forcible entry, with continuing forcible detainer;* and even then not to interfere when there is reasonable ground to expect that the party in actual possession will sustain his right.

(z) Id. p. 311.

(a) Id. p. 313, 4.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

Practical proceedings in case of forcible entry and detainer.

Although the statutes give summary jurisdiction to *one* justice to act separately, yet it is more usual and most prudent for *two or more* to meet and concur, at least in all the judicial acts; and though one justice might certainly receive the complaint of the party aggrieved, yet it is preferable that both the justices should be present, especially as the subsequent record of the fine, when established in general, states all the proceedings to have been before two justices, and in the present tense. It is recommended that the complainant be sworn, and do afterwards upon such oath, make his statement of his own right to the estate very particularly, and also shew the circumstances of the alleged *forcible entry*, or at all events of some original *illegal* entry. It was on account of the complaint in the case of *Rex* v. *Oakley*, (*b*) not shewing in the conviction for a forcible detainer, that the original *entry* was either *forcible* or *unlawful*, the Court quashed the conviction. (*b*)

If after a strict enquiry of the complainant, it should appear *doubtful* whether there was any breach of the peace in the entry, or whether upon the merits the party in possession has not the better, or at least an equitable right to retain it, then the best course will be for the justices to dismiss the complaint, and leave the party to indict at the sessions, or try his right in an action of ejectment. But if a strong case of recent forcible entry, especially if attended with any aggravated circumstances of violence, should be *prima facie* made out, then the justices, as conservators of the peace, ought to act, and promptly so, and to go to the premises and demand admittance, and endeavour fully to ascertain the circumstances of the original entry, and also of the continuing detainer; and unless on his own view, he observe violence or threats of using arms to exclude the party recently expelled, or if the offenders be not present, then the justices should not act upon their own view, but if required by the complainant, should issue their warrant to the sheriff, to summon a jury from the neighbourhood forthwith; (*c*) and even for the next day or shortly afterwards, (*d*) to try whether the entry was forcible as well as the detainer. So if the justices should find the force on their own view, the supposed offenders may traverse such finding, tendering such traverse *in writing*, as a mere *verbal* denial will not suffice; and then a jury must be summoned and impannelled to try the force

(*b*) 4 B. and Adolph. 307; and 1 Nev. and Man. 58; *ante*, 238, 9.

(*c*) 8 Hen. 6, c. 9, s. 4.

(*d*) Dalt. Jus. Ch. 133. The party traversing is to bear the costs of the trial of the traverse, and not the King or prosecutor.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

and other material allegations; (e) and we have seen that no restitution should be awarded before the jury have found the force, unless the defendant should decline traversing. (f) The complainant, it should seem, would not be a competent witness to prove any part of his complaint, being interested in endeavouring to obtain restitution. (g) If the jury should find the force, then the justices are to give judgment thereon, and draw up a formal record of the whole proceeding; (h) and thereupon the same justices are to proceed to the premises and remove the offender, and put the prosecutor in full possession. (i)

Certiorari to remove conviction.

If either the complaint or any proceeding thereon has been insufficient, or the justices have admitted improper evidence before the jury, so as probably to affect the merits of their decision; then, after six days notice of motion for a *certiorari*, that writ may be moved for, and obtained in the manner by which we have seen a *certiorari* may be obtained in ordinary cases. (k) The notice of the motion should state very explicitly all the objections to the proceedings; (l) and if it be apprehended that the justices will not faithfully return all the proceedings as they occurred, but will attempt to state them in an improved manner; then upon a special affidavit of the facts, a *mandamus* as well as a *certiorari* might be obtained, to compel them to return every stage of document and proceeding according to the facts. (m) If the Court of King's Bench should be of opinion against the sufficiency of the proceedings before the justices, they will then quash the conviction, and must as of course issue a writ of restitution. (n)

FOURTHLY, IN OTHER CASES AS BETWEEN LANDLORDS AND TENANTS.

1. Justice's assistance, when rent in arrear, and no sufficient distress, and premises deserted or uncultivated.
11 G. 2, c. 19. s. 16, 17; and 57 G. 3, c. 52.

A few summary proceedings by the intervention of justices in favour of *landlords*, and one on behalf of *tenants*, remain to be considered in this chapter; and first the case of a tenant in arrear for at least half a year's rent, and who has deserted the premises and left them uncultivated or unoccupied, so that there is not adequate property thereon to satisfy the arrear. It will be obvious that an event of this nature requires some *speedy and summary* relief, for otherwise not only would there be an increased arrear of rent from an insolvent tenant, but also

(e) 3 Salk. 169.
(f) Id. ibid.
(g) *R.* v. *Williams*, 9 B. and Cres. 549; *R.* v. *Bevan*, Ry. and Mood. 242.
(h) Hawk. B. 1, c. 64, s. 58; Dalt. J. c. 133.
(i) Hawk. B. 1, c. 64, s. 50.
(k) *Ante*, 219 to 226.
(l) *Ante*, 223.
(m) *Ante*, 200, 201, 218, 220.
(n) *R.* v. *Jones*, 1 Stra. 474; Bac. Ab. Forcible Entry, G.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

the premises would be continuously unproductive as well to the landlord as the tenant, and to the public, and the estate would rapidly become decayed or dilapidated, if not destroyed by intermediate waste or depredation; and therefore, although this is a jurisdiction by no means *properly* an incident to the office of a *conservator of the peace*, yet the Legislature, by 11 Geo. 2. c. 19. s. 16, (enlarged in some respects by 57 Geo. 3. c. 52,) authorized justices of peace in certain cases, presently particularly noticed, to give summary relief to the landlord whose property is in jeopardy; and this so expeditiously as to complete the object within fifteen days after the landlord's application to the justice, so as to place him in complete and indefeazable possession of the demised premises, the lease or tenancy being *ipso facto* thereby vacated, and the landlord immediately enabled either himself to occupy the premises beneficially, or to grant a fresh lease to a new tenant; subject only to an appeal, which is rather of a singular description, and certainly, as regards costs, in some respects of too limited a nature, viz. to the next judges of assize; or if in London or Middlesex, to the judges of the Court of King's Bench or of the Court of Common Pleas, who, if they should reverse the decision of the justices, may order restitution to the tenant, with *all his* expenses and costs to be paid by the landlord; or if they affirm the decision, then they are to award the *landlord's* costs, not *exceeding* 5*l.*, for the frivolous appeal. (*o*)

These statutes, however, only apply to a few cases of bad or unfortunate tenants, and only when the tenant holds lands, tenements, or hereditaments, at a *rack rent*, which we have seen is defined to mean a rent amounting to the *full* annual value of the tenement, or *near it*, (*p*) or by 57 Geo. 3. c. 52, "to a reserved "rent that shall be three-fourths of the annual value of the de-"mised premises at the least." It has been held that the term rack rent, as thus used in the former act, did not mean the rent *reserved*, but such a rent as the landlord and tenant might *fairly* agree upon, supposing the premises were vacant and unlet. (*q*) The expressions in these statutes, however, clearly denote that they are not intended to extend to tenancies in cases where the tenant has advanced a considerable premium upon the grant of the lease, or where there is but a small rent very unequal to the annual value of the property.

Before the 57 Geo. 3, it was considered that the recital in the 18th s. of the 11 Geo. 2. c. 19, imported that the jurisdiction of

(*o*) 11 Geo. 2. c. 19. s. 16, 17.

(*p*) As to what is rack rent, see *ante*, 1 Vol. 228.

(*q*) *Croker* v. *Fothergill*, 2 Bar. & Ald. 652; *ante*, 229.

justices should only extend to cases where there was a lease *expressly reserving a right of re-entry* in case of non-payment of the rent, and in effect only to give a summary remedy in cases where an action of ejectment could have been sustained.(r) But the 57 Geo. 3, removed that difficulty, by expressly extending the summary remedy to cases although no right of re-entry had been reserved, and to *all tenancies*, whether created by lease in writing or by parol, and although no right of re-entry in case of non-payment of rent had been reserved; and therefore the justices have jurisdiction in ordinary tenancies by parol from year to year, if half a year's rent be in arrear: and all that under the two statutes is now requisite to give justices jurisdiction, is "that the holding be at a rent of at least *three-fourths of the* "*yearly value*, and that *half a year's rent be in arrear*, and "that the tenant has *deserted* the demised premises, and left the "same *uncultivated*, or *unoccupied* so that *no sufficient dis-* "*tress can be had to countervail the arrears of rent*." Four circumstances must concur; 1st, a tenancy at not less than three-fourths of the annual value; 2dly, at least half a year's rent in arrear; 3dly, a desertion by the tenant; and 4thly, neither tender of the rent, nor a sufficient distress.

Practical proceedings.

The practical course of proceedings under these acts is for the landlord to whom at least half a year's rent is in arrear, and where the annual rent was at least three-fourths of the annual value, to apply to two justices of the county having no interest in the premises, either in person or by his bailiff or receiver, and *request* them, usually in writing, to go to view the same, and which they are to do. It has been holden, that the landlord's request or complaint need not be on *oath*, nor do the statutes even require it to be in writing. (s) But justices are advised to require a *written* complaint on *oath*, stating all the requisites essential to establish and satisfy the justices that it is a fit and legal case for their interposition, viz. "that the premises were held "at a rent not less than three-fourths of the annual value; that "half a year's rent is in arrear after demand; and that the "tenant has deserted the premises, and that there is no dis- "treinable property sufficient to pay the arrear." (t) It must have been intended by the Legislature, that all the facts essential

(r) See an express decision to that effect in Woodfall's Landlord and Tenant, 2nd edit. 523; and see *Ex parte Pilton*, 1 Bar. & Ald. 369.

(s) *Basten* v. *Carew*, 3 Bar. & Cres. 649; 5 Dowl. & R. 558, S. C.

(t) See a form of *complaint* in Burn's Justice title Distress, 26th edit. 1 Vol. 1044.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

to establish the right of a landlord to this summary proceeding before justices, should be inquired into before justices as fully as before the judges upon an appeal; and therefore justices may and ought to insist on all the facts being established before them. (*u*) It is true that all the statutes, in *express terms*, require the justices, on their first view, "to affix or cause to be affixed "on the most notorious part of the premises, *notice in writing* "what day (at the distance of fourteen days at least) they will re-"turn to take a second view of the premises;" and then it is only enacted that "if, upon such second view, the tenant or some person on his behalf shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the justices shall put the landlord into possession, and that the lease, as to any demise, shall thenceforth become void." But *impliedly*, they have full jurisdiction to inquire into the full merits, and it would be advisable that they should do so.

The terms of the act seem only to authorize the application to justices where the tenant has *deserted* the premises, *as well* as that he has left the same uncultivated or unoccupied; and where the tenant or any part of his family remains in actual possession, it should seem that the case is not within the statutes. (*v*) Supposing *desertion* to be essential, it has been held that where a tenant ceased to reside on the premises for several months, and left them without any furniture or sufficient other property to answer the year's rent, that the landlord might properly proceed under the 11 Geo. 2. c. 19. s. 16. to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they *first* went to view the same. (*w*) But questions respecting *desertion*, and the terms "*or uncultivated or unoccupied*," greatly depend on their own particular circumstances. (*x*)

The statutes do not in express terms require the justices to inquire into the fact of *desertion*, for on the first view they are merely to affix the notice, and on the subsequent view, if the rent

(*u*) It will be observed that the case of *Ashcroft* v. *Bourne and others*, 3 Bar. & Adolph. 684, and the form of the Justice's Record, in Burn J. tit. Distress, 26th edit. 1 Vol. 1015, suppose that all the facts have been established before the justices.

(*v*) See the facts of the case in *Ashcroft* v. *Bourne and others*, 3 Bar. & Ad. 685.

(*w*) *Ex parte Pilton*, 1 Bar. & Ald. 369; but although the tenant was absent he carried on business in the King's Road, Chelsea, and the house was in the course of painting and being rendered fit for the reception of an occupier; and therefore, although of counsel for the landlord, I considered the determination in that case, as respected *desertion*, to have gone *very far* in favor of the landlord; and see the next cases.

(*x*) The application of those terms were shortly discussed in *Basten* v. *Carew*, 3 Bar. & Cres. 649, though not fully reported in that respect; see also *Ashcroft* v. *Bourne*, 3 B. & Adolph. 684, 5.

be not paid, and there be no sufficient distress upon the premises, the statutes require nothing more, and they are as a matter of course to deliver the possession to the landlord. But nevertheless it should seem that justices ought to inquire fully into all the facts essential to support the proceeding, and especially as to the *desertion.*(y) The forms of the landlord's request, the justices' first notice, and their final record, are given in Burn's Justice, title Distress, and may in general be followed.

The 17th section of the 11 Geo. 2. c. 19, provides, that the proceedings of the Justices shall be examinable *in a summary way* by the Judges, as we have previously stated; and which, as respects premises in Middlesex and London, are by motion to the Court, founded on affidavits for a rule to shew cause, and cross affidavits, and counsel arguing on each side. Upon such a motion, unless where the proceedings on the part of the landlord are clearly irregular, the matter very frequently terminates in a compromise, and the tenant's paying all rent in arrear and costs, and submitting to proper terms.

If the decision of the Justices in favor of the landlord, followed by their delivery of possession to the landlord, should be reversed, and possession be ordered to be restored to the tenant, he is not thereby enabled to sue the Justices, or others who acted under them, in trespass, or otherwise; for the Justices acted judicially, and the production of the record of their proceedings will in general afford adequate protection to them, and all acting under them, for every thing done in execution of their decision. (z) But although all persons so acting under the sanction of the Justices would be protected from an action of *trespass*, yet if a landlord or others should maliciously cause the Justices to give possession, when the facts did not justify that decision, then perhaps, after its reversal, he might, on general principles, be liable to an action *on the case*, for maliciously, and without probable cause, improperly instituting the proceeding. (a)

Secondly, Justice's assistance when rent in arrear, and there has been a fraudulent removal to prevent a distress. 11 G. 2, c. 19. s. 4, 5, 6, 7.

The next proceeding against tenants, in which Justices are authorized to interfere, are those of a *fraudulent removal* by an *immediate* tenant, to prevent a landlord from distraining. This is an injury remediable by action and penalty, under the 11 Geo. 2, c. 19; the 4th section of that statute also provides, that where the goods fraudulently removed shall not exceed the value of 50*l.*, the landlord or his bailiff, servant, or agent, on his behalf, may exhibit a complaint in writing against the offenders before two

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(y) *Ashcroft* v. *Bourne and others*, 3 Bar. & Adolph. 684.

(z) *Ashcroft* v. *Bourne and others*, 3 B. & Adolph. 684.

(a) *Elsee* v. *Smith*, 2 Chitty's Rep. 304; and *ante*, 179, 180, 227.

CHAP. IV. SUMMARY PROCEEDINGS, &c.

Justices residing near the place of removal, or the place where the same were found, not being interested in the tenanted premises, and who are to summon the parties concerned, and all proper witnesses, and examine them and the facts upon oath or affirmation, and in a summary way determine whether or not the parties accused were guilty; and to enquire of the value of the goods fraudulently carried off or concealed; and upon full proof of the offence, they are then, *by order* under their hands and seals, to adjudge the offenders to pay double the value of the goods to such landlord, bailiff, servant, or agent, at such time as the Justice shall appoint. And in case of neglect or refusal to pay after notice, a distress warrant is to issue; and in default of distress, the offenders are to be committed to hard labour to the House of Correction, for six months, unless the money be sooner paid.

The 5th and 6th sections allow an appeal to the Sessions; and if a recognizance be entered into with one or two sufficient surety or sureties, then the order of the Justices is not to be executed pending the appeal.

Antecedent to any proceedings before Justices upon these clauses, it is necessary to examine the previous clauses of the same act, and the decisions thereon, to ascertain the legal meaning and object of the enactments; and these are given in notes to the statute. (*c*) In general, the removal must be by the immediate tenant, and not by a mere lodger, who is not to be considered guilty of a fraud in taking away his goods to escape from a distress for non-payment of rent properly due from another person, who has also, perhaps, received all sub-rent due to him; (*d*) and for the same reason, a creditor or purchaser, who has *bonâ fide* obtained or bought the goods from the tenant, is not within the act; (*e*) and to subject a third person to the proceedings before Justices, it must be shewn, not only that he assisted in the removal, but that he was privy to the fraudulent intention: (*f*) though in the case of a tenant, proof of his being privy to the removal would suffice. (*g*) But it is immaterial whether the rent was completely due, or only immediately becoming due at the time of the removal, provided the facts should establish an intention to defraud the landlord of his rent; for the words of the first clause speak of any removal to *prevent* the landlord from dis-

(*c*) Chitty's Col. Stat. 669, 670.

(*d*) *Thornton* v. *Adams*, 5 M. & S. 38; 2 Stra. 787.

(*e*) *Back* v. *Meats*, 5 Maule & S. 200.

(*f*) 8 Bar. & Cres. 537.

(*g*) *Lyster* v. *Brown*, 3 Dowl. & R. 501; 1 Car. and Payne, 121, S. C., overruling 3 Esp. R. 15.

training; and a removal just before, or on a Quarter Day, may *as*, if not *more*, effectually *prevent* a distress upon the premises, as a removal after that day; (*h*) and as the first section of this statute is in the alternative, *viz*., fraudulently *or* clandestinely, it is not absolutely essential that the removal should have been secret or clandestine; and provided it were clearly intended to prevent a seizure for the rent, it should be adjudged to have been *fraudulent*; (*i*) and a removal, with the privity of the tenant, though not ostensibly *by* him, will make him a fraudulent remover; (*k*) and the Justices may, in these cases, proceed, as may the Superior Courts, upon circumstances of suspicion, although not amounting to demonstration; (*l*) and therefore, a removal off the tenanted premises, to a neighbour's premises, and out of sight, so that the landlord would have difficulty in finding the cattle, is within the mischief of that statute. (*m*)

The jurisdiction of justices under the 4th section, is *concurrent*, and not exclusive of the Superior Courts. (*n*) The practical course of proceedings by the express terms of the act, require a complaint in *writing*, but no oath of the offence, in the first instance, is necessary. (*o*) If the goods have been removed from one county into another, then the Justices of either have jurisdiction. (*p*) The Justices are, by the tenor of the act, to summon the parties and witnesses, and to examine the witnesses to facts, on oath in the presence of the complainant and defendants, as usual in case of other summary proceedings. (*q*) As regards the form of the Justice's adjudication, the act declares it is to be *an order*. Hence, it follows, that it need not, perhaps, have all the requisites of *a conviction*; and it is said, that therefore the evidence need not be set forth as required in convictions; (*r*) and, on that account, it was supposed in one case, that an adjudication in the disjunctive, that the offenders assisted in fraudulently removing *or* concealing goods, was valid; (*s*) and although the penalty is to be double *the value* of the goods, yet it is not necessary to enumerate them in the order, though we have seen that in general in a

(*h*) *Furneaux* v. *Fotherby*, 4 Campb. 137; 2 Saund. 284.

(*i*) *Oppermens* v. *Smith*, 4 Dowl. & R. 53; and other cases, Chitty's Col. Stat. 669, note (*k*).

(*k*) *Lyster* v. *Brown*, 3 Dowl. & R. 501; 1 Car. & P. 121. S. C.

(*l*) *Stanley* v. *Wharton*, 9 Price, 301; 10 Price, 138.

(*m*) *Stanley* v. *Wharton*, 9 Price, 301.

(*n*) *Horsfall* v. *Davy*, Holt's C. N. P. 147; 1 Stark. 169, S. C.

(*o*) *R.* v. *Bisser*, Sayer R. 304, and Burn J. tit. Distress.

(*p*) *R.* v. *Morgan*, Caldecott, 156.

(*q*) *Ante*, 182 to 192.

(*r*) *R.* v. *Bissex*, Sayer R. 304.

(*s*) *R.* v. *Middlehurst*, 1 Burr. 399; and see *The King* v. *Rabbitts*, 6 Dowl. & R. 341.

conviction it would be otherwise. (*t*) But the safer and more judicious course in all these cases, is for Justices to draw up their *orders* with the same precision and particularity as we have seen are essential in convictions. (*u*) The form of a declaration for a fraudulent removal, shews the necessary allegations and statements in the order; (*v*) and the usual proceedings are published in Burn's Justice, which may, at least, *assist* in preparing the requisite form, but should never govern. (*w*)

Oath and warrant to authorize the breaking a *dwelling house* to seize goods fraudulently removed there, to prevent a distress for rent under 11 G. 4, c. 19. s. 7.

In connection, also, with cases of fraudulent removal, Justices of the Peace are, under the 11 Geo. 2, c. 19. s. 7, on the application of a landlord or lessor, or his steward, bailiff, or receiver, to administer an oath, "of a reasonable ground to suspect that *such* goods or chattels (that is, goods previously *fraudulently removed* to prevent a landlord from distraining for an arrear of rent, as previously prohibited in the statute; (*x*)) are in a *dwelling house*," so as thereupon, in the day time, to authorise the constable, or other peace officer of the hundred, borough, parish, district, or place, where the goods are suspected to be concealed, *in aid* of the landlord or other party applying, *to break open and enter such house*, and to take and seize such goods and chattels for the arrears of rent." This clause in the statute, requiring an oath, in order to enter a *dwelling house*, does not extend to other buildings, nor does the act, in terms, require any *warrant* from the Justice; but, as calculated to induce respect and submission, the most prudent course is to obtain a regular sealed warrant from the Justice, directed to the constable and all other Peace Officers; and the Justice should examine the parties as to the facts, and require so full and explicit an oath, as unquestionably to bring the facts within the meaning of the statute. (*y*) If the oath should be insufficient, and the Justice nevertheless should issue his warrant, he might perhaps be liable to an action of trespass; (*z*) and if a party should make the oath without adequate cause, he might be sued in case; (*a*) and in this proceeding, as much care

(*t*) *R.* v. *Rabbits*, 6 Dowl. & R. 341, *ante*, 165.

(*u*) *Ante*, 195 to 212; and see *R.* v. *Morgan*, Caldecot, 156. As to the distinctions between the stricter requisites of *convictions*, than of orders, see Burn J. tit. Orders of Justices, and *R.* v. *Bissex*, Sayer Rep. 304.

(*v*) See 2 Chitty on Pleading, 5th ed. 495, *b*, *c*, *d*.

(*w*) Burn J. tit. Distress, 26th edit. 1 Vol. p. 1009 to 1013.

(*x*) What is a fraudulent removal or not, *ante*, 246.

(*y*) See form of oath and warrant, in Burn's Justice, title Distress, Forms, 26th edit. 1 Vol. 1012, 3.

(*z*) *Morgan* v. *Hughes*, 2 T. R. 225, and *ante*, 178, 179.

(*a*) *Semble*, *Elsee* v. *Smith*, 2 Chit. Rep. 304; and *ante*, 179, 180, 227.

in ascertaining that there has been a removal, in every sense of that term *fraudulent*, as also that the goods are concealed in the particular dwelling-house, is as essential as in obtaining a search warrant. (*b*)

Thirdly, Summary remedy by justices, where *paupers* occupying as such retain possession after permission withdrawn under 59 G. 3, c. 12. s. 24, 25.

The 59 G. 3. c. 12. s. 24, after reciting "that *difficulties* had frequently arisen, and considerable *expenses* had sometimes been incurred, by the refusal of persons who had been permitted to occupy, or who had intruded themselves into parish or town houses, or otherwise, belonging to such parishes, to deliver up the possession thereof when thereunto required," enacts, that if any person who has been permitted to occupy, or hath intruded himself into *such* house or property, shall neglect to quit or deliver up possession *within one month after notice and demand in writing*, signed by the churchwardens and overseers of the poor of the parish, or the major part of them, and delivered to the person in possession, or in his absence affixed to some notorious part of the premises, it shall be lawful for two justices, upon *complaint* of one or more of the then churchwardens or overseers, to issue their summons to the person complained against, to appear before such justices, at a time and place therein appointed, and to cause such summons to be personally served, or to be affixed on the premises, *seven* days at the least before the time appointed for hearing such complaint; and such justices are thereby empowered and required, upon the appearance of the party, or upon proof on oath of such service or affixing of the summons, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises to be delivered to the churchwardens and overseers of the poor, or to some of them." The 25th section extends the like summary proceeding to recover *land* appropriated for the poor from the persons intruding thereon. And the schedule of the act directs the forms of proceedings.

The *difficulties* alluded to in the recital, were principally that of ascertaining in whom the legal estate or interest of the house or property was vested, so as to lay the demise properly in ejectment; for before the enactment in the 17th section of the statute, parish property did not vest in the churchwardens and overseers for the time being as a body corporate; (*c*) and

(*b*) What not a fraudulent removal, *ante*, 246; and as to Search Warrants, *ante*, 179, 180.

(*c*) *Woodcock* v. *Gibson*, 4 B. & Cres. 525; *Phillips* v. *Pearce*, 5 B. & Cres. 433.

the *expenses* were those of an action of ejectment, which would frequently much exceed the value of the fee simple of the property to be recovered. This statute, however, is accumulative, and does not take away the common law right of the parish officers to take possession without a month's notice, and without the assistance of justices, where a pauper or other person wrongfully refuses to quit, provided the possession can be obtained without a breach of the peace or forcible entry. (*d*)

The statute does not expressly require a complaint in writing or on oath; and therefore neither is strictly necessary; (*e*) but the forms in the schedule should be observed; and it is recommended to magistrates fully to investigate the facts, so as to ascertain whether they strictly fall within the meaning of the act, and not otherwise to interfere.

Fourthly, Justice's assistance, in case of *exorbitant charges upon a distress for arrear of rent*, not exceeding 20*l.* 57 G. 3, c. 93. (*f*)

The 57 G. 3. c. 93, was enacted in favour of tenants, and to enable a justice of the peace to afford redress, by summary proceeding, against excessive charges of a distress for rent, when made for an arrear not exceeding 20*l.* The schedule of the act specifies the allowed charges incident to such a distress, viz. 3*s.* for the levy, and 2*s.* 6*d.* per day for the man in possession, and 6*d.* in the pound for appraising, and the stamp duty thereon; and for all the expenses of advertisements, if any, 10*s.*, and a charge at the rate of 5*l.* per cent. on the net produce of the sale, for catalogues, sale and commission, and delivery of goods; so that if the rent be paid on the day of distress, the expenses may not exceed 5*s.* 6*d.* (*f*) If there be an unlawful charge, a justice is to summon the party complained of; and if, upon the hearing, it be established that more has been levied, taken, received, or had than is lawful, he is to order and adjudge treble the amount of the money unlawfully taken, to be paid by the wrong-doer, with full costs, to be levied by distress; and in default of goods, the party is to be committed till satisfaction of the order or judgment. The 3d section gives the justice express power to summon witnesses, and subjects them to 40*s.* penalty if they do not attend or refuse to give evidence, to be levied as aforesaid; and the 4th section enables the justice, if the complaint be unfounded, to give costs to the party complained against; but no judgment is to be given against any

(*d*) *Wildbour* v. *Rainforth*, 8 Bar. & Cres. 4.

(*e*) And see 3 Bar. & Cres. 649; 5 Dowl. & R. 558.

(*f*) It would prevent the increase of trifling actions for small irregularities in distresses, if summary remedy were given to the extent of five pounds damages in general. At present there is almost a daily waste of time in the Superior Courts, in trying actions of this nature, where scarcely two pounds damages are recovered, but the costs exceed perhaps one hundred.

landlord, unless he personally levied the distress. The act then provides, that this summary remedy, unless there has been a justice's order or judgment, shall not be any bar to any other proceeding; and the schedule gives the form of order, as well for as against the complainant.

The provisions of this act having been found of great practical utility, they have been extended to distresses for land tax, assessed taxes, poor rates, church rates, tithes, highway rates, sewer rates, or any other rates, taxes, impositions, or assessments whatsoever, where the sum demanded and due does not exceed 20*l.* (*g*)

Summary proceedings before justices, under the laws relating to Customs and Excise.

Under the antecedent system of laws relating to the customs and excise, as well as the new enactments in 3 & 4 W. 4. c. 50 to c. 60, justices have summary jurisdiction to hear and determine offences, in a manner much resembling the general course of proceeding pointed out in this chapter, and the principle of which will in all cases apply, where there has not been an express enactment upon the subject, but which must always be ascertained. The usual course of proceedings under the Custom Laws (*h*) and Excise Laws, (*i*) are stated exclusively in the 26th edition of Burn's Justice, title Excise and Customs; and the observations there to be found would assist in general.

Conclusion.

We have thus given an outline of the principal requisites to be observed by magistrates and others, in conducting summary proceedings, from the complaint of an injured individual or informer to final conviction, and the proceedings to enforce the same; a jurisdiction and practice of most essential and extensive importance. It will be a source of great gratification to the author, if it should be pronounced that this attempt has afforded any assistance to Justices of the Peace, or guarded them against those errors, the frequency of which might tend to bring their office into disrepute; for although he has been compelled to point out some discreditable instances of *gross blunders*, and some still more culpable *wilful* abuses of power, yet long experience has induced him to entertain a deep respect for the majority of magistrates, whose gentlemanly, temperate, and humane, but at the same time firm and judicious conduct, have, he is confident, mainly conduced to the continuance of the public peace and harmony of society.

(*g*) 7 & 8 Geo. 4, c. 17; and see the statutes, Burn's J. 26th edit. 1 Vol. 630.

(*h*) See course of proceedings for a penalty, &c. under the former Customs Laws, 2 Burn J. 26th edit. 2 Vol. 210 to 224; but see now 3 and 4 W. c. 50 to c. 60.

(*i*) See course of proceeding for a penalty, &c. under Excise Laws, Burn J. 26th edit. 2 Vol. 689 to 730.

INDEX

TO THIRD PART.



ABATEMENT,
amendment of law as respects nonjoinder, 51, 2.
plea of nonjoinder must aver omitted party resides in England, 52.
affidavit of that fact also required, *ib.*
may reply that omitted party is discharged by bankrupt or insolvent act, *ib.*
in second action, may have verdict against such as are proved liable, *ib.*

ACQUITTAL. See *Justices of the Peace.*
form of acquittal upon an information, 194, note (*q*).

ADJOURNMENT.
when justice should adjourn, 178, 184.
may adjourn, 185, 192.
care to be observed before adjourning, 184.
postponement of justice's decision, when, 192.

ADJUDICATION. See *Justices of the Peace.*
form of, in conviction prescribed by statute 3 Geo. 4, c. 23, 198, in notes.
and requisites of, in general, 202 to 208.
should appear that a judgment was pronounced, 203.
must be precise and certain, *ib.*

ADVERTISEMENTS.
expediency of, to ascertain who to be a plaintiff or defendant, 47, 48.
should avoid libellous expressions, 48.

AFFIDAVIT. See *Oath.*
form of, in swearing to service of notice of motion for certiorari, 223.
in support of motion for certiorari, *ib.*
what it should state, *ib.*

AFFIRMANCE OF CONVICTION. See *Justices of the Peace.*
conviction if affirmed, party to pay costs of appeal, 226.
execution to enforce, *ib.*

AGENTS.
cannot consent to a reference without an exprees power to do so, 77.

AGREEMENT TO REFER.
action may be supported for breach of, 80.
court of equity, will not in general compel specific performance of, *ib.*
may be revoked before award made, 79.
unless it has been made a rule of court, *ib.*
should be in writing, 86.
or not within the act, *ib.*
affidavit of execution of, may be made at any time, 91.
form of affidavit of, 92.

AMICABLE ADJUSTMENT. See *Compromise.*
duty of attorney in negociation of, 23.
when there should be no concealment in negociation for, 24.
duties of parties and attorney relating to, 57, 58.
enforced in equity, 58; *Attwood* v. ———, 5 Russell Rep. 149; *Goodman* v. *Sayers*, 2 Jac. & Walk. 249.

ANGLING. See *Justices of the Peace.*
penalty for, 136.

APOLOGY.
of the propriety of asking for, 57.
humiliating one should not be asked, *ib.*
duty of attorney, to afford opportunities for, *ib.*

APPEAL. See *Justices of the Peace.*
against conviction by *one* justice, when not if by two, 138, 9, 142.
no appeal unless expressly given, 215.
proceedings on appeal, 138, 9, 142.
when may be made, 214, 5.
justice's duty in respect of, 215.
party appealing must enter into recognizances, 215.
and give notice of appeal, 216.
notice must explicitly state all the objections, 217.
on whom must be served, 217.

APPEARANCE. See *Justices of the Peace.*
in default of, when arbitrator may proceed ex parte, 82.
justice may proceed ex parte, 134, 137.
when it cures defect in information, 170.
summons, 176.
statement of in conviction, 199.

APPOINTMENTS.
of meetings before arbitrator, 93, 4, 5.
form of, 93.

ARBITRATION, References to. See *Award, Submission.*
General Points.
the least hostile mode of proceeding, 70, 71.
is sometimes compulsory, 70.
but generally optional, *ib.*

First, Preliminary Observations upon References to Arbitration, 73.
when and under what circumstances they are expedient, *ib.*
trial by jury the most satisfactory tribunal, *ib.*
arbitrator should have had a *professional* education, 74.
attempts to *force* arbitration hitherto unsuccessful, *ib.*
principal instances of successful attempts to compel, *ib.*
in the Friendly Society Act, *ib.*
Saving Bank Act, *ib.*
Labourers and Servants in certain Trades, *ib.*
in disputes respecting seamen's wages, *ib.*
in certain claims for salvage, *ib.*
reasons why arbitration is compelled in those cases, *ib.*

When a reference is proper, 75.
in cases of long and intricate accounts, *ib.*
or where necessary to refer to numerous documents, *ib.*
or make or explain calculations, *ib.*
where difficult to collect all witnesses together on a particular day, *ib.*
between neighbours respecting nuisances, ancient lights, way or water-courses, *ib.*
or upon title to land where claim small, *ib.*
in investigating subjects of delicacy between relations, *ib.*
unless injury to character has been sustained, *ib.*

When a reference is improper, 75.
in cases of calumny, *ib.*
or cases of criminal conversation, 75, 6.
unless husband has no intention to seek a divorce, 76.
in criminal matters, unless by consent of Court, 75.
other cases, *ib.*
not when a defence is *stricti juris*, unless under qualified terms, *ib.*
caution necessary in terms of reference, *ib.*

Secondly, Who may refer, 77.
an infant or married woman cannot, *ib.*
a partner may, but not to bind co-partners, *ib.*
agents must have express power to refer, *ib.*
but at law counsel or attorney may bind client by referring at *Nisi Prius*, *ib.*
and party cannot avoid the reference, *ib.*
even upon oath of his express prohibition, *ib.*
in equity, solicitor cannot, unless by express authority, *ib.*
when executors, &c. should refer, *ib.*
should not without the consent of creditors, &c., *ib.*
when defendants should guard against personal liabilities, *ib.*
assignees should obtain consent of major part of creditors, *ib.*
and guard against making themselves personally liable, 78.

ARBITRATION, References to—(*continued*).

Thirdly, Utility of reference to find facts for the opinion of Court, 78.
by having facts concisely stated by arbitrator, *ib.*
recent acts enable parties to do this, *ib.*
but not until after issue joined, *ib.*
but it may be effected by consent without action, *ib.*
formerly this could not be done without the expense of a trial, *ib.*
when submission has been made a rule of Court, award may find facts specially subject to opinion of Court, *ib.*
who will, after argument, determine on same, *ib.*
form of such a reference, 90, 91.
and of award thereon, 112, 113.

Fourthly, Distinctions between references at *common law*, and under the *statutes*, 79.
at common law may be either verbal, *ib.*
or in writing not under seal, *ib.*
or by specialty, either bond or covenant, *ib.*
or by rule or order of a judge of Court in which action depending, *ib.*
and award made before revocation is equally binding, *ib.*
parties may countermand before award, *ib.*
unless submission has been made a rule of Court, *ib.*
but action sustainable for breach of agreement to refer, 80.
though in general a Court of Equity will not compel specific performance of such an agreement, *ib.*
obligation and effect of an arbitration in pursuance of 9 & 10 W. 3, c. 15, and 3 & 4 W. 4, c. 42, s. 39, 40, 41, *ib.*
statement of 9 & 10 W. 3, c. 15, *ib.*
statement of 3 & 4 W. 4, c. 42, s. 39, 40, 41, 82.

Fifthly, Who may be an *arbitrator*, arbitrators or umpire, 83.
should be free from interest or bias, *ib.*
not a relative, *ib.*
why preferable to refer to a barrister, 84.
precautionary provisions for securing another arbitrator, *ib.*
how to act if arbitrator refuse to proceed, *ib.*
must proceed in action as if no reference had taken place, 85.
Court of Chancery has refused to compel arbitrator to proceed, *ib.*

Sixthly, The *Practice and Law*, 86.
1st. The terms of submission, *ib.*
care required in framing, *ib.*
stipulation that submission shall be made a rule of Court, 86.
agreement to refer should be in writing, *ib.*
otherwise not within the act, *ib.*
and if not, might be revoked, 87.
submission by agent or trustee, how to be framed, *ib.*
submission by executors, assignees, &c., *ib.*
of limiting power of arbitrator, *ib.*
to prevent him making a *general* award, *ib.*
or to require him to state facts or point of law, *ib.*
other suggested terms, 88.
forms of submissions, *ib.* See tit. *Forms.*
when reference by rule or order of Court, it may be amended, 89.
otherwise not, *ib.*
as to insertion of omitted matters, 89.
but not to substitute arbitrator, 90.
2dly. The affidavit of execution of submission, 91.
may be made at any time after, *ib.*
and the making of it enforced, *ib.*
prudent to obtain same immediately instrument has been signed, 92.
form of affidavit, *ib.*
3dly. Of making submission a *rule of Court*, 92.
may be made before or after award, *ib.*
in vacation as well as term, *ib.*
when by agreement or deed advisable to make it a rule of Court shortly after, *ib.*
4thly. *Appointment of Umpire*, 93.
when arbitrators have power, may appoint one before disagreement, *ib.*
better to do so, *ib.*
on refusal of one umpire to accept appointment, arbitrator may appoint another, *ib.*

ARBITRATION, References to—(*continued.*)
umpire may make award after arbitrators have refused to proceed, 93.
but in general not before, *ib.*
how umpire should be appointed, *ib.*
form of arbitration, appointment of one, *ib.*
5thly. The Meetings and securing attendance of *Witnesses*, 94.
difficulty of securing punctual attendance, *ib.*
necessity or expediency of written appointments of meetings, *ib.*
and of appointing two consecutive days, *ib.*
duplicate of appointments should be signed by arbitrator, *ib.*
form of appointment of first or other meeting, *ib.*
a peremptory and final meeting, and of intention to proceed *ex parte*, *ib.*
hearing and production of evidence at the *first* meeting, *ib.*
should be principally of documentary evidence, *ib.*
as admissions may be made to save attendance of expensive witnesses, 95.
attornies should evince candour before arbitrator, *ib.*
meetings should be actually effective, *ib.*
sufficient witnesses should be in attendance, *ib.*
or attorney be prepared with documentary evidence, *ib.*
his duty in this respect to avoid expense, *ib.*
attendance of witnesses enforced by 3 & 4 W. 4, c. 42, s. 40, *ib.*
regulation to be attended to to enforce attendance, *ib.*
must be a tender of expenses, *ib.*
judge's order can only direct attendance for two named consecutive days, *ib.*
notice of appointed meetings, *ib.*
written appointment should be obtained from arbitrator, 96.
and duly served on opponent's attorney, *ib.*
and formal notice served where meeting intended to be final, 96.
prudent to leave copy at chambers of respective counsel, *ib.*
otherwise award might be set aside, *ib.*
6thly. Of *Enlargement* of the time, 96.
in general arbitrator has power to enlarge, *ib.*
enlargement should be duly made according to terms of order, *ib.*
or award would be void, *ib.*
power to enlarge in general discretionary, *ib.*
when award would be set aside for not allowing sufficient time, 96, 118.
when Court will order enlargement, 97.
for what time enlargement should be made, *ib.*
form of enlargement, *ib.*
7thly. The proceedings and hearing before arbitrator, *ib.*
arbitrator may proceed according to law and equity, *ib.*
and make award according to equity and conscience, *ib.*
without regard to strict rules of law, *ib.*
though not expedient to do so, *ib.*
proceedings should be conducted as in a Court of Law, 98.
how to be conducted, *ib.*
arbitrator may require a reciprocal statement, *ib.*
and declaration of what facts, &c. admitted, &c. *ib.*
8thly. Of enforcing attendance of *Witnesses, production of Documents*, and *swearing Witnesses* before arbitrator, 98.
formerly no mode of compelling attendance of a witness, *ib.*
even when he had engaged to attend, *ib.*
doubted whether he could be indicted for false swearing, *ib.*
but now attendance enforced by 3 & 4 W. 4, c. 42, s. 40, *ib.*
production of document enforced, *ib.*
by application to a Judge or the Court, *ib.*
must be a tender of reasonable expenses, *ib.*
may be indicted for perjury, *ib.*
form of affidavit to obtain order or rule, 99.
judge's order, *ib.*
suggestions as to witnesses, 100.
submission should be made a rule of Court, *ib.*
though not necessary, *ib.*
appointment of meeting need not precede order for attendance of witnesses, *ib.*
most convenient at meeting to state to arbitrator known unwilling witnesses, *ib.*

ARBITRATION, References to—(*continued.*)
and get appointment for two consecutive days, 100.
9thly. Of the arbitrator's *swearing the witnesses*, 100.
usual to swear them at *Nisi Prius*, *ib.*
when omitted may be sworn before a judge, *ib.*
and jurats produced before arbitrator, *ib.*
when arbitrator may swear them, *ib.*
and in case of false swearing may be indicted for perjury, *ib.*
mode of swearing, 100, 101.
form of oath, 101.
10thly. Examination of parties, witnesses and evidence, 101.
in general order provides that arbitrator shall be at liberty to examine the parties themselves, 101.
sometimes advisable to insist on such a provision, *ib.*
arbitrators generally reluctant to exercise the power, *ib.*
discretionary to do so, *ib.*
where the parties had been examined by consent, Court refused to disturb award, *ib.*
though defendant a felon convict, 102.
11thly. Mode of *taking down* the evidence, 102.
should be carefully taken down, in questions and answers, *ib.*
when concluded, read over to witness, *ib.*
and if further questions and answers arise, they should be added, *ib.*
witness may sign the same, *ib.*
attornies may take copy, *ib.*
original kept by arbitrator, *ib.*
12thly. Of *Revocations* in fact or law, 102.
provisions preventing revocations in 3 & 4 W. 4, c. 42, s. 39, *ib.*
when agreement of reference within statute, revocation void, *ib.*
arbitrator may proceed ex parte, *ib.*
and award would be valid, *ib.*
when award void after notice of revocation, *ib.*
when party revoking may be proceeded against, *ib.*
revocation not absolutely prohibited, *ib.*
sanction of judge or court requisite, *ib.*
sometimes perhaps otherwise, where arbitrator acts partially or improperly, 103.
though proper course to apply for summons for leave to revoke, *ib.*
when *marriage* of woman pending reference a revocation, *ib.*
death at law an implied revocation, *ib.*
unless provided otherwise, *ib*
as when award to be delivered to parties or executors, &c. *ib.*
provisions in case of death, *ib.*
decision of privy council, *ib.*
when surety liable for fulfilment of award made after death, 104.
when executor would be personally liable, *ib.*
death of *Arbitrator* determines power to proceed, *ib.*
unless provided otherwise, *ib.*
bankruptcy, its effects, *ib.*
not necessarily a revocation, *ib.*
when award not conclusive against assignees, *ib.*
when assignees would be bound by award, 105.
when may refer, *ib.*
certificate of bankrupt when not a discharge, *ib.*
advisable that submission should provide for revocation in case of bankruptcy, *ib.*
13thly, of the *award*, 105.
must conform to the authority in submission, *ib.*
will be void for even slight informality, *ib.*
instances, *ib.*
when power of arbitrator limited, he cannot go beyond it, 106.
must in terms or substance decide on all claims referred, *ib.*
and notice same in award, *ib.*
when award void for omission, 107.
award to do an impossible or illegal act, when valid, *ib.*
must be final, and when deemed so, 107, 8.
when not final or defective, because it does not order payment, 108.
attachment refused for omission, *ib.*
legal arbitrator may decide contrary to strict rules of evidence or law, *ib.*

ARBITRATION, References to—(*continued.*)
court will in general refuse to set aside award so found, 109.
unless real injustice appear, *ib.*
arbitrator should in general receive and act upon legal evidence, *ib.*
and decide according to law and equity, *ib.*
when reference made to avoid a legal and technical objection, arbitrator should not notice it, *ib.*
Costs, as to awarding them, 109.
party succeeding should be indemnified from, *ib.*
except when in some respect he has been to blame, *ib.*
then division of expenses would be just, *ib.*
agreement of reference generally contains provisions as to costs, *ib.*
when costs of reference are costs in the cause, 109, 110.
when not, 110, 111.
form of awards, 111. See *Forms.*
when an award may be good in part and void as to the residue, 114.
Publication of award, when, 115.
is so when notice given, that it is ready for delivery on payment of fees, *ib.*
Amendment of award not in general allowed, *ib.*
unless parties consent, *ib.*
court cannot interfere to alter the terms of an award, *ib.*
14thly. *Certificates* in lieu of an award, 112.
usual in causes of small importance, *ib.*
or mere quantum of damages referred, *ib.*
avoids the expence of stamps, 114.
form of certificate, *ib.*
15thly. Of setting aside awards, 116.
enactments in statutes, 81, 82, 116.
upon what grounds an award can or not be set aside on motion, *ib.*
principles are the same at law as in equity, *ib.*
disobedience of, when made a rule of court, treated as contempt of court, *ib.*
unless arbitrator misbehaved himself, 117.
or award procured by corruption, &c. *ib.*
will not be set aside on a question of fact, *ib.*
excepting for corruption, partiality, or irregularity of conduct in arbitrator, *ib.*
or on point of law when arbitrator a barrister, *ib.*
or on account of improper rejection or admission of the evidence of a witness, *ib.*
arbitrator may relieve against a harsh right, *ib.*
though the same would prevail in court of justice, *ib.*
where legal rights referred, award must be according to law, *ib.*
qualification of this rule, 117, 18.
if arbitrator exceed his jurisdiction, award may be set aside, 118.
when court will set aside award for misconduct of arbitrator, *ib.*
when not, 119.
when court will open award, 120.
or interfere to set it aside when void on face of it, *ib.*
will not after party objecting has adopted an award, *ib.*
within what time motion to set aside award must be made, 121.
Practical proceedings to set aside awards, 121.
submission must first be made a rule of court, *ib.*
when rule nisi must state objections, 122.
stated in affidavit, when sufficient, *ib.*
if made on slight grounds, will in general be discharged with costs, *ib.*
16thly. Proceedings to *enforce performance* of award, 122.
by attachment, 122, 3.
how opposed, 123.
by action, *ib.*
17thly. Jurisdiction in equity, 124.
18thly. Arbitration under particular statutes, 125.
compulsory under some statutes, as, *ib.*
The Friendly Society act, *ib.*
Saving Banks' act, *ib.*
for Seamen's Wages, *ib.*
under the Salvage acts, *ib.*

ARBITRATOR. See *Arbitration, Reference to.*
should have had a professional education, 74.
power of may be revoked before award, 79, 87.
unless submission has been made a rule of Court, 79.
who may be one, 83.
should be free from interest or bias, *ib.*
and not a relative of parties referring, *ib.*
in general preferable to be a barrister, 84.
Court of Equity will not compel him to proceed with reference, 85.
when he may appoint umpire, 93.
should do so before disagreement, *ib.*
if umpire refuse to act, may appoint another, *ib.*
form of appointment of one, *ib.*
power of compelling attendance of witnesses before, 94, 5.
appointment of meetings, 94.
in general has power to enlarge time for making his award, 96.
may proceed according to law and equity, 97.
may make award according to equity and conscience, *ib.*
without regarding *strict* rules of law, *ib.*
but most expedient to do so, *ib.*
should conduct reference as in a Court of Law, 98.
may require a reciprocal statement, *ib.*
and declaration of what facts will be admitted or disputed, *ib.*
party false swearing before, may be indicted for perjury, *ib.*
may swear the witnesses, 100.
mode of swearing, 100, 1.
form of oath, 101.
may sometimes examine the parties themselves, *ib.*
how he should take the evidence, 102.
when he may proceed ex parte, *ib.*
must conform to the authority in submission, 105, 6.
or award will be void, 105, 118.
how award should be drawn up, 105, 6. See *Award.*
when may give certificate in lieu of award, 112.
misconduct of, ground of setting award aside, 117, 118.

ARTICLES OF CLERKSHIP. See *Clerkship Articles of, Attorney and Solicitor.*

ARTICLED CLERKS. See *Attorney and Solicitor.*
regulations to be observed respecting, 1 to 16.
twenty-two points to be observed, 4, 5.
of the articles, 5. See *Attorney and Solicitor.*
terms of the articles and suggestions for improvement, 9, 10.
points to be observed before and after execution of the articles, 10.
what service essential, 10, 11, 12.
examination of before admission, 12, 13.
their education, 13 to 16, 41.

ASSAULT AND BATTERY. See *Justices of the Peace.*
summary proceedings before justices for, 132.
provisions of 9 Geo. 4, c. 31, s. 27, 132.
only applies to common assaults and batteries, 132, 3.
does not, if accompanied by attempt to commit felony, 132, 3.
or where any question arises as to title to land, 133.
or resisting process of any Court of Justice, 134.
form of information for, 171, note (*u*).
on *oath* of credible witness, offender may be summoned, 134.
form of such oath, 173, note (*b*).
in default of appearance, justice may proceed ex parte, 134, 137.
or may be apprehended in first instance, 134, 137.
prescribed form of conviction, 134, note (*t*).
construction of act, 9 Geo. 4, c. 31, 143, 4.

ASSETS.
bill in equity lies to discover, 52.

ASSIGNEES.
of bankrupt, when they should consent to a reference, 77.
should guard against personal liability, 78.

ASSIGNEE OF BOND.
must sue in name of obligor, 47.

ATTENDANCE.
of witnesses before an arbitrator enforced, 95.
regulations to be observed to enforce attendance, *ib.*
ATTORNEY AND SOLICITOR. See *Articles of Clerkship*, and *Client.*
reasons why an admitted agent must be retained, 1 to 4.
of the articles of clerkship, 4 to 15.
regulations to be observed, 4.
twenty-two points to be observed, 4.
1. The master must be a regular practising attorney, 4.
2. Terms of articles of clerkship, 4.
3. Stamp thereon, 4, 10.
4. Affidavit of execution of articles, *ib.*
to be filed within three months after date, *ib.*
5. Entry of such affidavit, *ib.*
6. Enrolment of articles, with affidavit of execution within six months, *ib.*
7. Affidavit of enrolment, and payment of duty, 5.
8. *Service* under the articles, *ib.*
9. Necessity for fresh articles to make up for lost time, *ib.*
10. Affidavit of regular service, *ib.*
11. Master's certificate of regular service, *ib.*
12. Notice of intention to apply for admission, *ib.*
must be affixed outside the court, *ib.*
13. Entry of such notice at judge's chambers, *ib.*
14. Examination before judge, 5, 12, 13.
15. Petition, &c., to obtain admission in case of difficulty, 5, 13.
16. Oath to be taken, 5.
17. Stamp on admission, *ib.*
18. The admission itself, *ib.*
19. Enrolment of name on rolls of court, *ib.*
20. Entry of name, and place of abode, *ib.*
21. Annual certificate, and stamp duty thereon, *ib.*
22. Entry of certificate with proper officer, *ib.*
First, Of the articles, 5
must be bound to a legally admitted attorney, &c., *ib.*
by contract in writing, to serve as a clerk for five years, *ib.*
which must be prospective, *ib.*
articles must not be antedated, *ib.*
nor executed after the five years have commenced, *ib.*
prudent to bind for *more* than five years, 5, 7.
with proviso, that at the expiration of five years clerk shall be at liberty to depart and obtain his admission, 5.
and that master shall facilitate that object, *ib.*
suggested form of proviso and covenant, 6.
otherwise, in case of wrongful absence during limited term of five years, requisite affidavit of service could not be made, *ib.*
and fresh articles for further time would be requisite, *ib.*
suggested form of such articles, *ib.*
such fresh contract must be stamped with same duty as original articles, 7.
but Commissioners of Stamps will allow duty on first articles if delivered up within six months of execution of new articles, *ib.*
must be a service altogether of five years; *ib.*
but need not absolutely be *continuous*, *ib.*
and must be *bonâ fide* to a continuing practising attorney, &c., *ib.*
and not to one who has left off practice, *ib.*
or not practising as principal on his own account, *ib.*
or serving as writer or clerk to another attorney, *ib.*
master's neglect to obtain certificate, will not invalidate service of articled clerk, 7.
binding may be to a prothonotary or secondary of superior courts, *ib.*
or to Master of Crown Office, *ib.*
service to, and admission as a solicitor, entitles to be admitted and practise as attorney, and *vice versa*, 8.
exceptions as to time of binding and service, *ib.*
as where clerk has taken degree of Batchelor of Arts or Law in one of the universities, *ib.*
then service for *three* years will suffice, *ib.*
provided such degree has been taken within limited time, *ib.*
clerk may serve one year as pupil to a barrister or certificated special pleader, *ib.*

ATTORNEY AND SOLICITOR—(*continued.*)
binding must be *bonâ fide* to learn the law, 8.
and not merely to secure business, *ib.*
Terms of the articles, and suggestions for improvement, 9.
statutes silent, except as to the service for five years, *ib.*
are generally improvidently framed, *ib.*
should contain master's covenant for return of premium in certain events, *ib.*
though court would compel return, 10.
master may covenant to pay a salary to clerk, 9.
and this during term of articles, *ib.*
or covenant to take into partnership, *ib.*
or pay widow or family of deceased attorney an annuity, *ib.* *Candler* v. *Candler*, 1 Jacob. Rep. 225.
may stipulate that clerk shall not practise within a reasonable distance, *ib.*
nor conduct business for any of his master's clients, *ib.*
or prejudice his master, *ib.*
and this under payment of fixed damages as *a debt*, and not as a *penalty*, 10.
Points to be observed before and after execution of articles, *ib.*
age and cirucmstances of clerk at time of binding, *ib.*
his previous education, *ib.*
articles must be stamped before engrossed, *ib.*
and the affidavit of execution duly filed, *ib.*
articles should be enrolled within six months, *ib.*
neglect, how prejudicial, *ib.*
Service and *affidavit* thereof, 10.
the binding must be for five years, *ib.*
enactments of 22 G. 2, c. 48, as to term of binding and service, *ib.*
provisions in case of death of master, 11.
or leaving off practice before end of term, *ib.*
or cancelling contract by mutual consent, *ib.*
or clerk being discharged by rule of court before end of term, *ib.*
or determination of articles by *any* other event, *ib.*
affidavit of actual service, requisite before admission, *ib.*
must be a *bonâ fide* exclusive continuing service, *ib.*
and to master named in articles, *ib.*
clerk should, at all reasonable times, be under immediate control of master, *ib.*
statute not complied with, by service to another attorney, *ib.*
though with master's consent, *ib.*
if admission obtained, not having so served, he may be struck off the roll, *ib.*
service under Notary's Act not complied with, by attending as a banker's clerk part of the day, *ib.*
clerk articled to one attorney, partner in a firm, may serve all in their joint business, 12.
or assist another attorney at *extra hours*, *ib.*
what absence is allowed, *ib.* See also, 13, 41.
occasional holidays no breach of legal service, 12.
especially in case of ill health, *ib.*
service to agent of master, limited *to one year*, *ib.*
where a *bona fide* service, court will not be astute in construing the act, *ib.*
Examination of clerk before admission, 12, 13.
by 2 G. 2, c. 23. s. 2, judges examine fitness to act as attorney, 12.
if judge satisfied, then to administer oath, 12.
and cause him to be admitted and enrolled as an attorney, 13.
in case of difficulty, the clerk may petition court, *ib.*
whose decision will be final, *ib.*
and *semble*, no court of appeal or higher tribunal, *ib.*
right of attorney admitted to Superior Courts, to be admitted to practise in Inferior Court, *ib.*
but this, subject to custom or practice of latter, *ib.*
when admission may be enforced by *mandamus*, *ib.*
suggested propriety of examination of clerks being transferred to other delegated authority, *ib.*
with power of appeal to judges for or against admission, *ib.*
Education of articled clerks, 13.

ATTORNEY AND SOLICITOR—(*continued.*)
preparatory education considered, 13, 41.
should not be articled before sixteenth year, 13.
and should have had a good classical education, *ib.*
advantages of studying the useful sciences, 14, 41.
should be well informed of the dead languages, 14.
and all other branches of knowledge and literature, *ib.*
especially of physics or natural philosophy, *ib.*
and this before commencement of *legal* pupillage, *ib.*
advantages of being articled for six years, 14, 15.
should be articled to a master of liberal education, 14.
what knowledge desirable, *ib.*
study of biographical works recommended, 15.
knowledge of temperament and character of mankind, *ib.*
How far the want of legal qualifications, may or not affect the client, 15, 16.
incompetency subjects attorney, &c., to penalty of 50*l.*, 15.
and precludes him from suing except merely for giving advice, *ib.*
but does not affect client, 16.
or deprive him of full costs, if plaintiff, and successful, *ib.*
except, when warrant of attorney executed by a defendant, in custody under mesne process, *ib.*
then presence of uncertificated attorney insufficient, *ib.*
prudent to ascertain that party is attorney of proper court, *ib.*
How to *select* an attorney, 16. 1 Vol. 435.
should employ an *experienced* solicitor of established character, 16.
or one whose zeal, &c., would make up for want of experience, 17.
the principal desideratum should be honorable character, *ib.*
reasons why this should be attended to, *ib.*
purchaser should not employ vendor's attorney, *ib.*
nor *cestui que trust* employ a trustee who is an attorney, *ib.*
nor should he act as such, *ib.*
if he do, he cannot charge for professional business, *ib.*
Not to be concerned against a person previously his client, 18.
if he do, Court of Equity would restrain him from divulging confidential communications, 18.
cannot give up his client and act for opposite party, *ib.*
nor solicitors in partnership to dissolve, so as to enable one partner to act against client of the other, *ib.*
one solicitor and clerk in court may be concerned for opposed parties, *ib.*
but this disapproved of, *ib.*
same objection applies to London agent, acting for country attornies on both sides, *ib.*
but no injunction to restrain articled clerk from afterwards acting as attorney against a client of his late master, *ib.*
consequent risk of deeds in attorney's office being accessible to clerks, 18, and *ante*, vol. 1. 436.
expediency of stipulating in articles of clerkship against clerk acting injuriously to interests of master's clients, 18.
and for clients stipulating for a guarantee against such consequences, *ib.*
Retainers in writing recommended, and why, 18.
formerly requisite for attorney to file retainer to sue, 19.
but now not requisite, either at law or in equity, *ib.*
though such omission has been censured, *ib.*
and would create a prejudice against the attorney, *ib.*
observations of Lord Tenterden on the subject, *ib.*
should be given for the client's sake, *ib.*
and qualified according to deliberate intention of party, 19.
specially when solicitor retained by assignees of bankrupt, 20.
should obtain the signatures of all his employers, *ib.*
should stipulate for due care in ascertaining title, *ib.*
with engagement to make satisfaction upon the discovery of the defect, *ib.*
this to avoid the Statutes of Limitation, *ib.*
form of retainer on behalf of plaintiff to sue, *ib.*
on behalf of defendant to defend, *ib.*
Confidence, observance of, 20.
attorney or solicitor cannot legally disclose client's communications, 18 and 20.
nor can he be *compelled* to disclose them, 20.
though as to *acts* done in his presence, no such privilege, 21.

ATTORNEY AND SOLICITOR—(*continued.*)
held by Lord Tenterden to be confined to communications relating to a *suit*, 21.
but now held not so limited, *ib.*
otherwise, were one attorney employed for both parties, *ib.*
Duties of Attorney to ascertain facts, evidence, and law, before suit, 21, 53.
See fully title *Proceedings between Retainer.*
should be well assured of *sufficient evidence*, 21, 53.
when to examine witnesses in first instance, 21.
and that in absence of the client, *ib.*
Lord Tenterden's observations on duty of attorney in this respect, *ib.*
if law of case questionable, should suggest expediency of obtaining opinion, 22.
when thereby protected from liability, *ib.*
not protected, if case improperly stated, *ib.*
or stated too *generally*, *ib.*
or without drawing counsel's attention to particular facts, *ib.*
or has not raised material points, *ib.*
or has drawn a conclusion from deeds without laying the same before counsel, *ib.*
in these cases, he would be liable for negligence, *ib.*
if opinion doubtful or ambiguous, should require further opinion, *ib.*
if doubtful, should obtain written directions from client, how to proceed, 23.
observation of Lord Tenterden in such cases, *ib.*
of Lord Stowell, where the client is ignorant or illiterate, *ib.*
when attorney should attend to proceedings himself, *ib.*
and not delegate to a clerk, *ib.*
in case of neglect will have to pay costs himself, *ib.*
duty of attorney to ascertain proper parties, and cause of action, 46 to 53.
Negociations, duty of attorney in respect of, 24; and see 58, and tit. *Compromise.*
should be conducted with candour and liberality, 24.
but when honor of opponent unknown, communication to be cautious, *ib.*
and this, though expressed, to be without prejudice, *ib.*
when negociation for amicable adjustment, reciprocal duty not to conceal, 24.
or proctor, attorney, &c. may have to pay all costs, *ib.*
Taking securities for client, his duty therein, 24, 25.
when arrangement beneficial to client, should instantly obtain written agreement, 25.
lest party should fly from engagement, *ib.*
Expenses, impropriety of increasing same, *ib.*
Expedition, duty of, 25.
paramount importance of expedition, 25.
courtesy to opponent should not be shewn at expense of client, *ib.*
delays increase expense, 26.
instances of delays, *ib.*
when proceeds recovered, should be immediately paid to client, *ib.*
Remuneration to Attorney or Solicitor.
stipulations for remuneration out of usual course illegal, 26.
may stipulate for advances, *ib.*
or require guarantee of third person, *ib.*
in writing. expressing the consideration, 27.
cannot take a *prospective* mortgage to secure *future* costs, 27.
client should unasked offer advance of money, or security, 27.
attorney may refuse to proceed without advance, 27.
but must give due notice of his requiring same, 27.
at end of action, fees and bills to be promptly paid, 27.
unless there has been gross negligence, &c., *ib.*
or charges be for unnecessary and useless business, *ib.*
or excessive, *ib.*
if the latter, and any taxable item, then bill must be delivered one month before commencing action, *ib.*
if not taxable, then tender should be made, *ib.*
should not stipulate for remuneration to depend on the event, *ib.*
or stipulate to receive part of estate in lieu of costs, *ib.*
or to receive a named sum in case he should recover, *ib.*

ATTORNEY AND SOLICITOR—(*continued.*)
any stipulation out of usual course illegal and void, 28.
and Court of Equity will in general set it aside, *ib.*
even a compromise on terms of not taxing, illegal, *Balme* v. *Paver*, 1 Jacob R. 307.
Bill of Costs, construction of 2 G. 2, c. 23, s. 23, as to necessity of month's delivery of, 28.
act should be construed liberally in favour of suitors, *ib.*
extends to Courts not of Record, *ib.*
preparing replevin bond a taxable item, *ib.*
although no bill had been delivered, *ib.*
or procuring an insolvent's discharge, *ib.*
or for business done under a commission of lunacy, 29.
but it seems there must be some formal step *perfected*, or at least *prepared*, constituting the *commencement* of some *legal proceeding*, 29.
as drawing and engrossing an affidavit to hold to bail, *ib.*
or preparing a warrant of attorney, *ib.*
or a charge for a dedimus potestatem, *ib.*
or attending at a lock-up house and filling up a bail bond, *ib.*
or attending and advising a party in a suit, *ib.*
an item for business done under an extent, *ib.*
What charges are not within the act, 29.
all business unconnected with any suit, 29.
as for searching to see whether satisfaction of judgment had been entered, 29.
or whether an issue had been entered and docketed, *ib.*
or attending attorney of opposing creditor to resist insolvent's discharge, 29, 30.
or where attorney had paid money in consequence of his undertaking to pay debt and costs, 30.
or a bill for proceedings in bankruptcy, *ib.*
though a charge for obtaining a certificate would be otherwise, *ib.*
Taxing Bill of Costs.
when illiberal to tax, 30.
when proceedings have been conducted faithfully, *ib.*
unless charges are exorbitant, *ib.*
when client resolves to tax, should do so within the month, *ib.*
or pay the amount and then tax, *ib.*
if charge improper, Court will, on motion, oblige attorney to refund, *ib.*
but no action for amount can be sustained, *ib.*
When delivery of Bill unnecessary, and how to proceed if unreasonable, 30.
statute 2 G. 2, c. 23, s. 23, only applies to proceedings relating to some suits or proceedings in Courts, *ib.*
does not apply to charges for conveyancing, *ib.*
but where charges exorbitant, money may be paid under protest, 31.
or *tender* made, 31.
without prejudice to an action, to try propriety of charges, 31.
when an action may be sustained, 31.
provisions of Usury and Annuity Acts with regard to solicitors procuring loans of money, 32.
penalties under the same, 32.
provisions evaded by attorney making extravagant charges for deeds and withholding a portion of the money, 32.
in some cases held to invalidate annuity, 32.
but in a late case held otherwise, 32.
party may be compelled to refund, 32.
and perhaps have to pay costs of application, 32.
Liabilities of Attornies, &c., 32.
generally not liable for a mistake on a point of law, when doubtful, 32.
not absolutely protected by acting under counsel's opinion, 32, 22.
especially when case not properly stated, 21, 2, 33.
otherwise perhaps when case properly drawn, 33.
liable for errors in *practical* department, *ib.*
in these cases remedy by action, *ib.*
and Court will not summarily interfere, *ib.*
unless attorney guilty of want of *integrity*, *ib.*
and then although no suit or proceeding pending, *ib.*

AWARD. See *Arbitration, Reference to.*
enlargement of time for making, 96.
in general power given to arbitrator, *ib.*
must be duly made according to terms of order of reference, *ib.*
or it will be void, *ib.*
when would be set aside for not allowing sufficient time, *ib.*
may be made according to equity and conscience, 97.
without regard to strict rules of law, 97, 108.
though most expedient to do so, 97.
proceeding before the arbitrator, 97 to 102.
of revocation of agreement in fact or law, when it avoids award, 102.
when void after revocation, *ib.*
when void if made after death, 103.
when delivery of to be to executors, &c., *ib.*
surety when liable for fulfilment of, 104.
executors, and when liable under, *ib.*
bankruptcy, its effects, *ib.*
when not conclusive against assignees, *ib.*
award must conform to authority in submission, 105.
or will be void for even slight informality, *ib.*
arbitrator cannot award further when power limited, 106.
and must in terms or substance decide on all claims referred, *ib.*
and award must notice same, *ib.*
or will be void for omission, 106, 7.
award to do an illegal act, when void, 107.
must be final, and when deemed so, 107, 8.
when defective for not ordering payment, 108.
attachment refused for omission, *ib.*
when not made according to strict rules of law, Court will in general refuse to set it aside, *ib.*
unless real injustice appear on the face of it, 109.
should be according to law and equity, *ib.*
except reference made to avoid a legal and technical objection, arbitrator should not notice it, *ib.*
as to awarding costs, *ib.*
when just to divide expenses of, *ib.*
when costs of reference, costs in the cause, 109, 110.
when not, 110, 111.
forms of awards, 111. See *Forms.*
when certificate in lieu of, 112.
award, when good as to part and void as to residue, 114.
when published, 115.
is so when notice given that same is ready for delivery, *ib.*
cannot in general be amended, *ib.*
unless parties consent, *ib.*
Court cannot interfere to alter terms of, *ib.*
when may be set aside, 116.
provisions of statutes respecting, 81, 2, 116.
on what grounds may be set aside, 116.
disobedience of, when made a rule of Court, treated as contempt of Court, 116.
where arbitrator misbehaved himself, 117.
or procured by corruption, *ib.*
will not on a question of fact, *ib.*
or on point of law, when arbitrator a barrister, *ib.*
or on account of improper rejection or admission of evidence, *ib.*
may relieve against a harsh right, *ib.*
though the same would prevail in a Court of Law. *ib.*
if legal rights referred, must be according to law, *ib.*
qualification of this rule, *ib.*
may be set aside, if arbitrator exceeds his jurisdiction, 118.
when for misconduct of arbitrator, *ib.*
when not, 119.
when may be opened, 120.
or set aside when void on face of it, *ib.*
will not when party objecting has adopted it, *ib.*
within what time motion to be made, 121.
practical proceedings in setting aside award, *ib.*
the submission must be made a rule of Court, *ib.*
when rule *nisi* must state objections, 122.

AWARD—(*continued.*)
when sufficient, if stated in affidavit, 122.
if application made on slight grounds, will be discharged with costs, *ib.*
proceeding to enforce performance of, 122.
1. By attachment, 123.
how opposed, *ib.*
2. By action, 123.

AWARDS, Forms of. See title *Forms.*

BACHELOR OF ARTS.
when proposed clerk has taken degree of, service for *three* years to attorney, &c. will suffice, 8.
same exception in favour of students for the bar, 38.

BACHELOR OF LAW.
when proposed clerk has taken degree of, service for *three* years to attorney will suffice, 8.
same exception in favour of students for the bar, 38.

BARRISTERS. See *Students for the Bar.*
no precise course of study or examination prescribed to become one, 37.
before practising must have been a member of one of the Inns of Court for five years, 3, 4, 37.
exception in favour of bachelor of laws, 38.
rules respecting the admission of, 38, 39, 40.
must obtain a certificate of approbation before he can be called to the bar, 3 & 4, 39.
legal qualification not attended to by the benchers, 3 & 4, 39.
may appeal to the judges when admission refused, 3 & 4, 39.
such appeal rarely successful, 3 & 4, 40.
cause of failure at the bar considered, 41.
course of study recommended, 41.
other attainments beyond the law requisite, 41, 2.
the functions of, 42, 3.
their opinions and the requisites of, 43.
should be direct and positive, *ib.*
reasons in support of succinctly stated, *ib.*
statutes and decisions shortly referred to, *ib.*
should suggest where case ambiguous, *ib.*
and what precautionary measures should be taken, 44.
their duty with respect to pleadings, 44, 5.
general character of, 45.
retainer of, 71, 2.

BATTERY. See *Assault and Battery, Justices of the Peace.*

BEAST.
penalty for stealing of, 135.

BILL OF DISCOVERY. See fully, tit. *Proceedings between Retainer, &c.*
when necessary, to discover who to be defendant, 49, 52.
when parties bound to answer, 49.
when landlord may file, against tenant, *ib.*
lies against lessee and mortgagee, when, 50.
cannot be enforced, when on face of it *no remedy*, *ib.*
to compel defendant to admit or deny a promise of marriage, 52.
or signature to a memorandum taking case out of Statute of Limitations, *ib.*
or to discover assets, *ib.*
to exhibit an account of assets, &c. in Ecclesiastical Court, *ib.*
when, to discover whether a particular person is in existence, 53.
or where he resides, *ib.*
provisions of 6 Ann, c. 18, to discover death of party, *ib.*
of costs on bills of discovery, 54.

BILL OF COSTS. See *Attorney and Solicitor.*
construction of 2 G. 2. c. 23, s. 23, as to necessity for a month after delivery of, 28.
what are or not taxable items in, 28, 29, 30.
to be taxable, must be for business connected with a suit, &c. 28.
when illiberal to tax, 30.
when action for amount may be sustained, 29, 30.
when not, 30, 31.

BILL OF COSTS—(*continued.*)
when delivery of bill unnecessary, 30.
when a tender of amount of, should be made, 31.
or amount paid under protest, *ib.*
when Court will oblige attorney, &c. to refund, 30.

BILL TO PERPETUATE TESTIMONY. See *Evidence*, *Witnesses*.

CALUMNY.
actions for, improper to refer, 75.

CAUSE OF ACTION.
what, and how to discover it, 46, 52, 53.
duty of attorney to ascertain, 52.

CERTIFICATE.
of master, of regular service of articled clerk, 5.
though usual, may be dispensed with, *ib.*
of obtaining certificate, *ib.*
stamp duty thereon, *ib.*
entry of, with proper officer, *ib.*
annual certificate, and duty thereon, *ib.*
in lieu of an award, nature of, 112.
form of, 114, in notes.
form of justice's dismissal of information for an assault and battery, 195.

CERTIFICATED CONVEYANCER. See *Conveyancer Certificated.*

CERTIORARI. See *Justices of the Peace.*
convictions under 7 & 8 G. 4. c. 29, 30, not to be removed by, 139, 142.
in general lies as a matter of right, 219.
unless taken away by statute, 219, 139, 142.
when conviction may be removed by, 219, 220.
when not, 139, 142.
conviction under 9 G. 4. c. 31, not removable, 134.
7 & 8 G. 4. c. 29, 139.
7 & 8 G. 4. c. 30, 139, 142.
1 & 2 W. 4. c. 32, 139, 143.
course to pursue when certiorari taken away, 220.
within what time to be moved for, 221.
what notice required, 221, 222.
what it should contain, 222.
who must sign it, *ib.*
affidavit of service of notice must be made, *ib.*
how to be entitled, *ib.*
should specify grounds of objections, 223.
form of affidavit of service of notice of motion, *ib.*
in support of motion, 224.
grounds on which Court will grant or refuse application for certiorari, *ib.*

CESTUI QUE TRUST.
should not employ a trustee who is an attorney, 17.
nor should he act as such, *ib.*

CHOSE IN ACTION.
assignee of, must sue in name of obligor, 47.

CLASSICAL EDUCATION. See *Education of Articled Clerks.*
of articled clerks, considered, 13, 14.
of students for the bar, considered, 38 to 45.

CLERKSHIP, ARTICLES OF. See *Attorney and Solicitor.*
twenty-two points to be observed, 5, 6.
must be with legally admitted attorney, &c. 5, 7.
and not to one who has left off practice, 7.
or not practising on his own account or serving another attorney, *ib.*
but may be to a prothonotary or secondary of Superior Courts, *ib.*
or to the Master of the Crown Office, *ib.*
in writing, to serve for five years, 5, 7.
but need not absolutely be *continuous*, 7.
and which must be prospective, 5.
must not be antedated, *ib.*
nor executed after five years have commenced, *ib.*
prudent to bind for more than *five years*, 5, 7.

CLERKSHIP, ARTICLES OF—(*continued.*)
with proviso that at *expiration* of five years contract shall cease, and clerk be at liberty to depart and obtain his admission, 5.
and that master shall facilitate that object, *ib.*
suggested form of such proviso, 6.
exceptions as to time of binding, and service, 8.
as when proposed clerk has taken degree of bachelor of arts or law in the universities, *ib.*
then service for three years will suffice, *ib.*
terms of the articles, and suggestions for improvement, 9.
suggested covenants, *ib.*
points to be observed before and after execution of articles, 10.
as to age and circumstances, *ib.*
and education, *ib.*
stamping articles before execution, *ib.*
affidavit of execution should be duly filed, *ib.*
articles should be enrolled within six months, *ib.*
neglect to do these may prejudice, *ib.*
what service and affidavit of service essential, *ib.*
must be for five years, 5, 7, 10.
enactments of 22 G. 2. c. 48. in this respect, 10.
provisions in case of death of master, 11.
or leaving off practice before end of term, *ib.*
of cancelling contract by mutual consent, *ib.*
or by rule of court before end of term, *ib.*
provisions of 34 G. 3. c. 14. s. 8, as to determination of articles, *ib.*
must be *bona fide* continuing service, *ib.*
and under immediate controul of master, *ib.*
statute not complied with by service to another master, *ib.*
though with master's consent, *ib.*
but articles to one partner in a firm, service to all the partners in their joint business, sufficient, 12.
or may serve another attorney at *extra* hours, *ib.*
may receive instructions in sciences, *ib.*
or have occasional holidays, *ib.*
especially in case of ill health, *ib.*
may serve agent of master *for one year only*, *ib.*
where a *bona fide* service, court will not be astute in construing the act, *ib.*
Fresh articles.
when necessary to make up for lost time, 6.
suggested form of such articles, *ib.*
must be stamped with same duty as original articles, *ib.*
but commissioners will remit duty on original articles, *ib.*
necessity for, avoided by binding for *six* years, 5, 7.

CLIENT. See *Attorney and Solicitor.*
conduct and interest of, considered, 16 to 34. See *Attorney and Client.*
when affected by want of *legal* qualification of presumed attorney, 15.
when not, 16.
rules for client's selection of an attorney, *ib.*
should employ experienced solicitor, *ib.*
but principal desideratum *honorable character*, 17.
purchaser should not employ vendor's attorney, *ib.*
solicitor, &c. should not be concerned against party who had once been his client, 18.
if he does, Court of Equity would restrain him from communicating confidential communications, 18, 20.
cannot be given up by attorney to act for opposite party, 18.
danger of leaving deeds of clients accessible to clerks, *ib.*
expediency of stipulating with attorney against such danger, *ib.*
and obtaining a guarantee, *ib.*
should give a written retainer for his own sake, 19.
and qualified according to intention of party, *ib.*
should stipulate for due care in ascertaining title, *ib.*
with engagement to make satisfaction on *discovery* of defect, *ib.*
attorney's duty in obtaining proper securities for, 24, 25.
should spontaneously offer advance of money to attorney, &c., 27
attorney may refuse to proceed without an advance of money, *ib.*
should promptly pay at end of suit, *ib.*
unless there has been negligence, *ib.*

CLIENT—(*continued.*)
or bill of costs excessive, 27.
then he should tax the same, *ib.*
when not taxable, should tender a sufficient sum, *ib.*
when illiberal to tax attorney's bill, 30.
should be taxed within the month, *ib.*
attorneys, and liabilities, 32.
bound by solicitor and attorney's consenting at nisi prius to a reference, 77.
though against his express prohibition, *ib.*
proceedings to be adopted by client before suit, 46 to 71. See fully, tit. *Proceedings between, &c.*

COMMITMENT. See *Justices of the Peace.*
should strictly pursue the conviction upon which founded, 213.
deviation from, in general justice liable to action of trespass, 214.
but this now aided when proceeding under 9 Geo. 4, c. 31, 7 & 8 Geo. 4, c. 29, c. 30, and 1 & 2 W. 4, c. 32, 214.
must be in writing, 214.
and not verbal, *ib.*
nor for an unreasonable time, *ib.*
demand of penalty, when should be made before commitment, 214.

COMMON ASSAULT. See *Assault and Battery.*

COMPENSATION. See *Justices of the Peace.*
summary proceedings to obtain, 127 to 251.

COMPLAINANT.
in general not liable if acting *bona fide*, 227.
but is if acting from malice, *ib.*
not liable for errors of justice, 228.

COMPLAINT. See *Information.*

COMPROMISES.
duties of attorney relating to, 24, 57, 58.
propriety of asking for considered, 57.
duty of attorney to afford opportunities for, *ib.*
how to conduct negotiation for, 24.
may be invited on both sides, 58.
should be *bona fide* and fairly conducted, *ib.*
costs sometimes affected by, *ib.*
in criminal cases, 58, 193, 4.
at law, where several claimants all must concur, 58.
different rule prevails in equity, *ib.*
when sufficient for majority to agree, 69.
enforced in equity, 58; *Attwood* v. ———, 5 Russell Rep. 149; *Goodman* v. *Sayers*, 2 Jac. & Walk. 249.
when justices may interfere to effect, 193, 4.
enactments in this respect, *ib.*
when parties liable for compromising, 193.
Computation of Time.
how month calculated, 69, 147.

CONFESSIONS. See *Justices of the Peace.*
when sufficient, 184.
defect in information, when not aided by, *ib.*
recital of in conviction, 199.
how to be stated in conviction, 198. note (*f.*)

CONCEALMENT.
when for amicable adjustment, there should be none, 24.
or attorney, proctor, &c. would be liable for the costs, 25.

CONFIDENTIAL COMMUNICATIONS. See *Attorney and Solicitor, Client.*
how far courts prevent their disclosure of, 18, 20, 21.
when court of equity will restrain from being communicated, 18, 20.
attorney &c. cannot be compelled to disclose them, 20.
except in certain cases, *ib.*
as where attorney employed for both parties, 21.

CONVEYANCER, CERTIFICATED.
of in general, 34.
no direct recognition of, before 44 G. 3, c. 98, s. 14, *ib.*
admitted on becoming a member of one of the Inns of Court, *ib.*

CONVEYANCER, CERTIFICATED—(*continued.*)
without regard to qualification, *ib.*
stamp duty on certificate, *ib.*
penalty for practising without certificate, 34, 35.
provisions of 55 G. 3, c. 184. respecting, 35.
when duly licensed may sue for his fees, 36.
without delivery of bill one month before action, *ib.*
bill cannot in general be taxed, *ib.*
unless mixed with law proceedings, *ib.*
no regulation prescribing course of study or examination, 37.
beyond that reposed in the benchers of the Inns of Court, 37.

CONTRACTS.
difficult sometimes to determine who to be defendant, 49.
of the parties in cases of, 51.
of nonjoinder of parties, *ib.*
defects of former law remedied, *ib.*

CONVICTION. See *Justices of the Peace.*
general form of, prescribed by 3 G. 4, c. 23—197, 8.
defects in, when aided, 209, 210.
form of, under 9 G. 4, c. 31, s. 27, 134.
shall not be void for want of form, *ib.*
or removed by certiorari, *ib.*
form of, under 7 & 8 G. 4, c. 29, 138.
when before *one* justice party may appeal, *ib.*
proceedings on appeal, 138, 9.
not to be quashed for want of form, 139.
or removed by certiorari, *ib.*
to be returned to the Quarter Sessions, *ib.*
when to be evidence in future cases, 142.
form of under 7 & 8 G. 4, c. 30, 142.
party aggrieved may appeal, *ib.*
not to be quashed for want of form, *ib.*
or removed by certiorari, *ib.*
under 1 & 2 W. 4, c. 32, *ib.*
proceedings before conviction considered, 182.
when it must be before two justices, 183.
when it would be quashed, on account of justice refusing to hear evidence, 189.
what evidence should be stated in, 190.
what it should contain, 196.
should be deliberate, *ib.*
but be completed with *due* expedition, 196.
when defendant has a right to copy of, 197.
should be returned to Quarter Sessions, *ib.*
when justice liable for neglect in, *ib.*
formal parts and requisites of, *ib.*
in what respects imperative, consequences of deviation, 198.
recital of information in, 198.
usually in the past tense, *ib.*
recital of appearance and defence, 199.
should be stated according to fact, *ib.*
recital of confession, 199.
recital of evidence, *ib.*
mode in which evidence should be stated, 200.
evidence of each witness should be stated separately, *ib.*
and in precise words of witness, 200.
and not merely the result, *ib.*
justice refusing, may be compelled to do so by mandamus, 201.
how defence should be stated, 201.
what evidence on face of conviction will suffice, 202.
statement of adjudication, 203.
form prescribed in 3 G. 4, c. 23, 203.
must appear that a judgment was pronounced, 203.
must be precise and certain, *ib.*
when it should negative exceptions, *ib.*
what statement of offence necessary, 204.
or of defendants waiving objections, *ib.*
must observe certainty in stating offence, 204, 5.

CONVICTION—(*continued.*)
when uncertainty in information aided by conviction, 205.
statement of several offences, 205.
adjudication as to forfeitures, &c., 206.
as to costs, 207.
conclusion of conviction, 208.
the date, *ib.*
signing and sealing, *ib.*
when under particular statutes, 209.
when must be in words prescribed by statute, *ib.*
when may vary, *ib.*
defects in, when aided, 209, 210.
of enforcing payment under, 212.
commitments under, 213. See *Commitments.*
appeal against, 214. See *Appeal.*
recognizance to prosecute appeal, 215. See *Recognizance.*
notice of appeal, 216. See *Notice of Appeal.*
mandamus, 217. See *Mandamus.*
certiorari, 219. See *Certiorari.*

COPY OF CONVICTION. See *Justices of Peace.*
conviction should be returned to Quarter Sessions, 197.
when defendant has a right to copy, 197.

COPY OF WARRANT.
when demand of, should be made, 61, 2.
form of demand, 62.
when unnecessary, *ib.*

COSTS. See *Attorney and Solicitor.*
when attorney &c. should have to pay, in case of neglect, 23.
or for concealment of facts pending a negociation, 24.
or in annuity transaction, 32.
when acquitted, defendant entitled to, 51.
when allowed on bills of discovery, 54.
will be given where demand excessive, 57.
of retaining counsel, when allowed, 71, 72.
on convictions, 207.
of appeal, 217.
recognizance to pay, on motion for *certiorari*, 225.
defendant not entitled to, on motion for *certiorari*, *ib.*
but is if appeal decided in his favor, 226.
reason for this distinction, *ib.*
in cases of forcible entry and detainer, 241.
between landlord and tenant, when no sufficient distress. and premises deserted, 242, 245.
in cases of fraudulent removal to avoid distress, 246.
in cases of excessive charges under distress warrant, 250.

COUNSEL. See *Barrister.*
duty of attorney to consult with client as to retaining of, 71.
should retain without delay, *ib.*
should retain such as would be certain to attend place of trial, *ib.*
and as are most experienced, *ib.*
of the number to retain, *ib.*
of the allowance for, in taxing costs, *ib.*
general retainer, when should be given, 72.
not allowed in taxing, *ib.*
his right to appear in summary proceedings before justices, 186, 7.

COUNSEL'S OPINION.
expediency of obtaining, 21, 32.
when protects attorney from liability, 21, 32.
not so if case improperly stated, 22, 32.
or too generally, 22, 32, 3.
requisites of counsel's opinion, 43, 4.

COURTESY.
should not be shewn to opponent, at expense of client, 25.

COURT OF EQUITY.
will restrain attorney from communicating confidential communications, 18.
but will not restrain clerk who has commenced practice from acting as attorney against parties for whom his master was employed, 18.
will in general set aside improper stipulations as to costs, &c., 28.

COVENANT. See *Attorney and Solicitor.*
on part of master for return of premium to articled clerk in event of death, 9, 11.
or other determination of service before end of term, 9, 11.
or to pay a salary to clerk, 10.
or that at end of term he shall be taken into partnership, 10.
to pay widow of deceased attorney an annuity, 10. *Candler* v. *Candler*, 1 Jacob R. 231.
that clerk shall not practise within reasonable distance, 10.
or accept business from his master's clients, *ib.*
or do any thing to prejudice his master, *ib.*

CRIMINAL PROCEEDINGS.
improper to refer, in cases of, 76.
unless by consent of Court, 76.
compromise of, 193, 4.

CRIMINAL CONVERSATION.
action for, improper to refer, 75, 6.
except husband has no intention to seek a divorce, 76.

CUSTOMS AND EXCISE.
provisions of acts with respect to notices, 68.

DEAD LANGUAGES.
a knowledge of, essential before clerk articled, 14.

DEATH.
bill of discovery lies to discover death of a party doubted, 53.
provisions of 6 Anne, c. 18, to discover, 53.

DEEDS, &c.
danger of leaving them accessible to clerks, 18.

DEFECTS.
in information, when aided, 158, 176.
in conviction, when aided, 210.

DEFENCE.
on summary proceedings before justices, 191. See *Justices of the Peace.*
recital of, in conviction, 199.

DEFENDANT.
who to be made so, and how to ascertain, 46 to 52.
sometimes difficult to determine who is to be, 47, 48.
who to be, in action of ejectment, 47.
in case of malicious injuries, 48.
of torts or contracts, 48, 9.
of libels, 48.
against stage coach proprietor, *ib.*
when necessary to file bill for discovery of, 49.
when parties would be bound to answer, *ib.*
when acquitted, when entitled to costs, 51.
duty of attorney to ascertain precise party, *ib.*
joinder and non-joinder, alterations in law, *ib.*

DELICACY.
investigation of subject of, reference proper, 75.
unless injury to character has been sustained, *ib.*

DELIVERY.
of bill of costs, when necessary, 29, 30.
when not, 31, 32.

DEMAND.
propriety of making, before litigation, 56.
should be made, unless party likely to abscond, *ib.*
of interest, when should be made, 57.
form of such demand, *ib.*
of precise sum, not material at law, *ib.*
otherwise in equity, *ib.*

DEMAND—(*continued.*)
when excessive, costs will sometimes be given, 57.
of apology, when should be made, *ib.*
of perusal and copy of warrant, 61.
when should be made, *ib.*
form of demand, 62.
not necessary where party has not acted strictly in obedience to the warrant, *ib.*
of return of goods, when advisable, 60.
when to be repeated, *ib.*

DEPOSITIONS. See *Oath.*

DETAINER, 236. See *Forcible Entry and Detainer.*

DISCOVERY, BILL OF. See *Bill of Discovery.*

DISTRESS. See *Justices of the Peace, Landlord and Tenant.*
unreasonable costs of distress, where sum distrained for not more than 20*l.*, recoverable back before one justice, 250.
summary proceedings when rent in arrear, 241.
enactments in this respect, 242.
jurisdiction given to justices, *ib.*
in cases of fraudulent removal to avoid, 245.
provisions of 11 Geo. 2. c. 19. s. 4, *ib.*
for unlawful charges under distress warrant, 250.

DISTRESS WARRANT. See *Commitments, Justices of the Peace.*
mode of enforcing penalties by, 212.
can only be made under express enactment, 212, 13.
no replevin lies, 213.
goods distrained under, may be sold, *ib.*

DOCUMENTS.
production of, before arbitrator, may be enforced, 98.

DOG.
penalty for stealing of, 135.

EDUCATION OF ARTICLED CLERKS. See *Attorney and Solicitor. Students for the Bar.*
should be attended to previous to binding, 10.
should receive instruction in sciences, 12.
their preparatory education considered, 13.
should have had a good classical education, *ib.*
advantages of studying the useful sciences, 14.
the dead languages, *ib.*
and other branches of knowledge and literature, *ib.*
especially physics or natural philosophy, *ib.*
knowledge of drawing useful, *ib.*
study of biographical works recommended, 15.

EJECTMENT.
on whose demise the action should be brought, 47.
should not be on demise of *cestui que trust*, *ib.*
but on demise in name of trustee, *ib.*
when unnecessary, 231, 2.

ENLARGEMENT. See *Arbitration.*
of time for making award, 96.
power of, generally given to arbitrator, *ib.*
should be made according to terms of reference, *ib.*
or award would be void, *ib.*
in general, discretionary in arbitrator, *ib.*
when Court will order it, 97.
for what it should be made, *ib.*
form of, *ib.*

ENROLMENT. See *Attorney and Solicitor.*
of articles of clerkship, with affidavit of execution, must be within six months, 4, 10.
of name on rolls of Court, 5.

ENTRY. See *Attorney and Solicitor.*
of affidavit of execution of articles of clerkship, 5.
of notice of intention to apply for admission, *ib.*
of name and place of abode on obtaining admission, *ib.*
of certificate with proper officer, *ib.*

ENTRY OF NAME. See *Attorney and Solicitor.*
necessary on obtaining admission and taking out certificate, 5.

EQUITY DRAFTSMAN. See *Students for the Bar.*
his functions considered, 42.

EVIDENCE. See *Justices of the Peace.*
duty of attorney to ascertain, before commencing proceedings, 21, 46, 53.
his liability in case of negligence, 53.
who to ascertain evidence, 53, 4.
when bill for a discovery of, may be filed, 54.
or to perpetuate testimony, *ib.*
evidence before arbitrator, how to be taken and stated, 101, 2.
before justices on summary proceedings, how to be taken, 188.
oath to be administered, *ib.*
mode of examination, 189.
of taking evidence, *ib.*
should be taken verbatim, *ib.*
at least all the words material, 190.
should not be taken in the words of statute, *ib.*
should be read over to witness, *ib.*
how should be stated in conviction, 190, 200.
omission of justice to do so, observance may be compelled by mandamus, 190, 200.
must state the facts, and not merely the result, 190, 200.
what evidence on face of conviction will suffice, 201.
on appeal, fresh evidence admissible, 218.

EXAMINATION. See *Attorney and Solicitor.*
of articled clerk previous to admission, 5, 12, 13.
by 2 Geo. 2. c. 23. s. 2, judges empowered to examine as to fitness, 12.
suggested propriety of clerks being examined by other officers, 13.
with power of appeal to judges, *ib.*

EXCEPTIONS. See *Justices of the Peace.*
when to be stated in information, 166, 7, 8.
to be proved by defendant, 167, 191.
when to be stated in conviction, 203, 4.

EXECUTORS. See *Arbitration.*
when they may consent to arbitration, 77.
should guard against personal liability, *ib*

EXEMPTIONS, 166 to 168. See *Exceptions.*

EXPEDITION.
attorney's duty to expedite, 25.
importance of, *ib.*

EXPENCES.
impropriety of increasing, by any means, 25.

FEES. See *Attorney and Solicitor.*
stipulations relating to, considered, 26 to 32.

FISH. See *Justices of Peace.*
penalty for destroying of, 135.

FORCE. See *Forcible Entry and Detainer.*
what sufficient to justify justice's proceedings in cases of forcible entry and detainer, 234, 5.

FORCIBLE DETAINER, 236. See *Forcible Entry and Detainer, Justices of the Peace.*

FORCIBLE ENTRY AND DETAINER. See *Justices of the Peace. Forcible Entry,* Vol. 1.
right of justices to interfere, 231.
what a forcible entry, 232, 3, 4.
even by party having a right to possession, 232.
how he should act, *ib.*
cannot take possession by force, *ib.*
when party may safely act without assistance of a justice, 233.
court of equity, in cases of wrongful possession, will grant injunction to prevent waste pending legal proceedings, *ib.*
jurisdiction of justice, *ib.*
founded on statute law, *ib.*

FORCIBLE ENTRY AND DETAINER—(*continued.*)
two descriptions of forcible ousters, 233.
1. forcible entry and expulsion, *ib.*
2. forcible detainer where entry not forcible but illegal, *ib.*
who may be guilty of a forcible entry or detainer, *ib.*
what constitutes a forcible entry, 234.
1. Forcible entry and forcible detainer after such entry, 234.
defined and prohibited by statute, *ib.*
when justices may proceed to give possession, *ib.*
when not, *ib.*
must have *view* of continuing force, 234, 5.
when jury must be empannelled to try forcible entry, 234.
upon finding of force, justice may then proceed, *ib.*
when he may break open doors, 235.
and cause offenders to be arrested, *ib.*
justices' duty on finding force, *ib.*
proceedings in case there is no continuance of the force in view of justice, *ib.*
2. Forcible detainer, 236.
proceedings under, *ib.*
enactments respecting, 236, 7.
justice cannot act when wrong-doer has been continually in possession for three years, 237.
what a forcible detainer, 238.
may be whether entry forcible or not, *ib.*
instances of forcible detainer, *ib.*
between landlord and tenant, *ib.*
when conviction by justices insufficient for not stating that the *entry* was *illegal*, 238, 240.
decisions of the judges as to what an illegal entry under 8 Hen. 6. c. 9, 238, 9.
when tenant holding over guilty of illegal entry, 239.
in these cases prudent to try right in a civil action, *ib.*
practical proceedings in cases of forcible entry and detainer, 240.
statutes give jurisdiction to *one* justice, *ib.*
most prudent for *two* to act, *ib.*
complainant should be sworn as to his right to estate, and of the forcible or illegal entry, *ib.*
or conviction not shewing that entry illegal, would be bad, *ib.*
when case doubtful, justice should not act, *ib.*
but leave party to try right, *ib.*
or should issue warrant to sheriff to impannel a jury, *ib.*
when offenders may traverse finding of justices, *ib.*
restitution should not be awarded before the jury have found force, 241.
or defendant decline traversing, *ib.*

FORCIBLE OUSTERS. See *Forcible Entry and Detainer, Justices of the Peace.*
are of two descriptions, 233.
1. forcible entry and expulsion with continuance of force, *ib.*
2. forcible detainer where entry only illegal, *ib.*

FORM, WANT OF.
not to vitiate information after appearance and plea, 170.
conviction not to be quashed for want of, 139, 142.

FORMS OF.
articles of clerkship for more than five years recommended, 6.
new articles to make up for lost time, 6.
written retainer of attorney for plaintiff, 20.
the like for a defendant, 20.
terms of letter from plaintiff's attorney to defendant before action, 56.
written demand of interest under 3 & 4 W. 4, c. 42, s. 28, 57.
terms of an apology, 37.
demand on a constable of perusal and copy of warrant, 62.
notice of action to a justice for false imprisonment, 66.

Relating to Arbitrations.
agreement of reference not under seal, 88.
the like by cross bonds, *ib.*
indenture of reference, *ib.*
recital of general or particular grievances referred, *ib.*

FORMS OF—(*continued.*)
stipulation to abide by award, *ib.*
power to enlarge, *ib.*
agreement that submission shall be made a rule of Court, 89.
that parties and witnesses to be examined on oath, *ib.*
costs of the action to abide event, *ib.*
all other costs in discretion of arbitrator, *ib.*
proviso that an award signed by two or three arbitrators shall suffice, *ib.*
power to appoint fresh arbitrators or umpire, and for the latter to award without a further meeting, *ib.*
extensive power to enlarge, *ib.*
power to regulate or fix terms on which a nuisance may be continued, 89.
order of reference of an indictment for nuisance, 90.
stipulation against revocation by death, marriage, bankruptcy, &c., 90.
stipulation that death of arbitrator shall not revoke, &c., *ib.*
power to examine parties and witnesses on oath, *ib.*
stipulation to state a candid and explicit account of claims and produce documents, 90.
stipulation that arbitrator shall expressly, upon face of award, adjudicate separately upon each claim, *ib.*
stipulation that arbitrator shall, if required, state evidence and points of law on face of award, *ib.*
power to award costs of delay, 91.
power to proceed ex parte in case of absence or not bringing forward evidence, 91.
power to proceed ex parte in a fuller form, *ib.*
agreement to prevent an executor from being liable without assets, *ib.*
power to award the entry of a judgment to secure payment, *ib.*
stipulated damages to be paid in case of unreasonable delay by either party, 92.
affidavit of signature to the agreement of reference by attesting witness, *ib.*
form of arbitrator's appointment of an umpire, 93.
arbitrator's appointment of the first or other meeting, 94.
appointment of peremptory and final meeting, and intention to proceed ex parte, *ib.*
arbitrator's enlargement of time for making his award, 97.
affidavit to obtain a judge's order or rule for a witness to attend before an arbitrator and produce certain documents pursuant to 3 & 4 W. 4, c. 42, s. 40, 99.
judge's order thereupon for the attendance of the witness with a named document, *ib.*
oath or affirmation to be administered by an arbitrator to a witness, pursuant to 3 & 4 W. 4, c. 42, s. 41, 101.
award in favour of a plaintiff upon a reference of a cause and all matters in difference, 111.
recital of order of *Nisi Prius*, *ib.*
time enlarged, *ib.*
hearing of parties and evidence, *ib.*
award, *ib.*
award under an order of *Nisi Prius* for plaintiff, but subject to facts for opinion of the Court with a report of decision of the Court thereon, 112.
award finding facts and adjudging in form of special verdict, 113.
award of release, 114.
certificate instead of an award, *ib.*

Forms of Proceedings before Justices of the Peace.
form of conviction prescribed in 9 Geo. 4, c. 91, 134.
form in 7 & 8 Geo. 4, c. 29 and c. 30, 138.
form of information on recent acts or on any penal statute, 156.
complaint or information for a common assault and battery on 9 Geo. 4, c. 31, s. 27, 171.
information on 7 & 8 Geo. 4, c. 29, s. 40, for breaking a dead fence with intent to steal same, *ib.*
information on 7 & 8 Geo. 4, c. 30, s. 24, for a wilful or malicious injury, *ib.*
information on Game Act, 1 & 2 W. 4, c. 32, s. 30, for a trespass in pursuit of game, 172.
oath to obtain a summons, 173.
summons to the defendant on a complaint or information and after oath, 177.
warrant to apprehend to answer a summary complaint or information, 179.
summons to a witness, 182.
acquittal by justices, 194, n.

FORMS OF—(*continued.*)
certificate of dismissal of complaint under 9 Geo. 4, c. 31, s. 27, 195.
conviction prescribed by 3 Geo. 4, c. 23, s. 1, 197.
recognizance of appeal against a conviction under the Game Act, 1 & 2 W. 4, c. 32, 215.
judgment of affirmance of the sessions on an appeal against a conviction on the Game Act, 1 & 2 W. 4, c. 32, 216.
notice, pursuant to 13 Geo. 2, c. 18, of an intended motion for a certiorari to remove a conviction, 223.
affidavit in support of application for a certiorari, stating facts and objections, and also swearing to service of notice of motion, 224.

FOUND COMMITTING. See *Justices of the Peace.*
offender under 7 & 8 Geo. 4, c. 29, may be apprehended without warrant, 136, 140.
meaning of that term in different acts, *ante*, 1 vol. 617 to 631.

FRAUDULENT REMOVAL. See *Justices of the Peace, Landlord and Tenant, Distress.*
summary proceedings in cases of, 245.
provisions of 11 Geo. 2, c. 19, s. 4, *ib.*
complaint must be in writing before two justices, *ib.*
justices to summons parties concerned, 246, 7.
examination to be on oath, *ib.*
value of goods removed to be ascertained, 246.
and parties offending to pay double the value, *ib.*
refusal to do so, a distress warrant to issue, *ib.*
default of distress, party to be committed for six months, *ib.*
party appealing must enter into recognizance, &c., *ib.*
order to be stayed pending appeal, *ib.*
what a fraudulent removal, 246, 7.
jurisdiction of justices, 247.
requisites of the order, *ib.*
advisable to be drawn up with same precision as a conviction, 248.
oath and warrant to authorize the breaking a dwelling-house to seize goods fraudulently removed, *ib.*
enactment of 11 Geo. 2, c. 19, s. 7, *ib.*
caution to be observed before granting, 248, 9.

FRIENDLY SOCIETY ACT.
arbitration compulsory under, 74, 125.
parties precluded from *suing* in cases within its enactments, 135, 6.

GAME ACT. See *Justices of the Peace.*
summary proceedings under 1 & 2 W. 4, c. 32, 142.
penalties under, 142, 3.
distribution of penalty, 143.
form of information stated, 172, in note.
form of conviction prescribed, 143.
proceedings for penalties under, 143, 147.
conviction and commitment under, when valid, 146.

HOUSE DOVE.
penalty for killing, &c. of, 135.

INFANT.
cannot consent to a reference, 77.
is subject to summary information and conviction, 152.

INFORMATION. See *Justices of the Peace.*
within what time it must be exhibited, 147.
provisions of different statutes, *ib.*
month, how to be construed, *ib.*
when the first day to be included, 147, 8.
decisions in this respect contradictory, 148.
who to prosecute information, 149.
requisites to be observed, 150, 1.
against whom, 151.
in general before one Justice, 154.
form and strictness required in general, 155.
form of, 156, 171, 172.
substance of, varies according to nature of complaint, 157.
defects in, when aided, 158.

INFORMATION—(*continued.*)
may be sustained in part, though bad as to residue, 158.
surplusage, when it will not prejudice, *ib.*
when it must be in writing, *ib.*
when on oath, 159.
unnecessary, if statute does not require it to be so, *ib*
though addition will not prejudice, *ib.*
must be in name of proper complainant, &c., 160.
Statement therein of time of exhibiting same, 161.
of *place* of exhibiting same, *ib.*
what statements necessary, 162.
must be made accurately, *ib.*
or conviction would be void, *ib.*
the *time* of committing offence, *ib.*
advisable to state real day, *ib.*
place of committing offence, 163.
when local description essential, *ib.*
when not, *ib.*
description of offence, 164.
the requisite particularity, *ib.*
when not merely in words of statute, 165
should be as extensive as facts will admit, *ib.*
must state offence substantially against statute, 168
must be positive, 166.
when particular words, as *wilfully*, &c., essential, *ib.*
and not argumentative, *ib.*
nor in the alternative, *ib.*
when must negative exceptions or exemptions, 166 to 168.
how should conclude, 168, 9.
may contain several counts, 169.
prayer, that offender may be summoned, 170.
defects in, how aided, *ib.*
Several forms of, 170, 1, 2. See *Forms.*
duty of Justice to receive information, &c., 173.
he must correctly produce, and return the original information, 18?
should be read to defendant if in writing, *ib.*
or substance stated to him, *ib.*
right of third persons to be present on hearing of, 187.
mode of taking the evidence, 189.
of hearing the defence, 191.
justices may postpone the decision, 192.
cannot enforce attendance of witness, 181.
provisions of 1 & 2 W. 4. c. 32, in this respect, omitted in other acts, *ib*
recital of, in conviction, 198.
usually in the past tense, *ib.*

INFORMER. See *Justices of the Peace.*
in general not liable if acting *bona fide*, 227.
otherwise if proceeding from malice, *ib.*
not liable for errors of justice, 228.

INSPECTION OF WARRANT.
when demand of, should be made, 61, 2.
when unnecessary, 62.

INTEGRITY.
when attorney guilty of want of, Court will summarily interfere, 33.
although no suit, &c. pending, *ib.*

INTEREST.
demand of, when should be made in writing, 57.
form of demand, *ib.*

INTRICATE ACCOUNTS.
in actions upon, proper to refer, 75.

JURISDICTION of Justices. See *Justices of the Peace.*
when one justice may adjudicate, 183.
when two are essential, *ib.*
enactments of different statutes must be considered, *ib*
when he may proceed ex parte, 184.

JUSTICES OF THE PEACE. See *Notice of Action, Warrant.*
proctor whilst practising as such, cannot act as one, 3, 4.
I. *Of the notice of action to, and requisites*, 63 to 69. See tit. *Notice of Action.*
II. *Summary proceedings before, from information to conviction*, 127 to 251.
First, observations as to summary proceedings in general, 127.
Secondly, when in general expedient, 127, 231.
The law and practice relating to same, 127 to 250.
Jurisdiction of justices of the peace out of the sessions originally very limited, 128.
formerly their jurisdiction principally ministerial, *ib.*
except in cases of forcible entries and detainers, *ib.*
but now more extended, *ib.*
extended to cases of contract, 129.
extended to small private injuries to persons or property, *ib.*
objects of recent enactments, *ib.*
construction of statutes respecting their jurisdiction, 130, 131.
general precautions to be observed by justices, 131.
First, for a common assault or battery on 9 G. 4. c. 31. s. 27, 132.
provisions of act, 132, 3.
only applies to common assaults and batteries, 133.
and does not apply if accompanied by any attempt to commit felony, *ib.*
or where any question arises as to title to land, &c. *ib.*
or under any process of any court of justice, 134.
on oath of credible witness justice may issue summons, *ib.*
in default of appearance, on proof of due service of summons, may proceed ex parte, 134, 137.
or may issue warrant in first instance, 134, 137.
offences under act must be commenced within three months, 134.
form of conviction, *ib.*
shall not be quashed for want of form, *ib.*
or removed by certiorari or otherwise, *ib.*
commitment not void, when, *ib.*
proceedings must be before two justices, 135.
whose decision is final, *ib.*
construction of act, 143.
Secondly, for petty stealings of property, under 7 & 8 G. 4. c. 29, 135.
provisions of act, 135, 6, 7.
for taking or killing hare or coney in day time, 135.
stealing any dog or beast, *ib.*
killing, &c. any house dove or pigeon, *ib.*
taking or destroying fish, *ib.*
angling in day time, 136.
stealing trees, &c. *ib.*
receivers of property punishable as principals, *ib.*
and subject to same penalties, *ib.*
and recoverable before *one* justice, *ib.*
offenders *found committing* may be apprehended without warrant, *ib.*
on oath of credible witness justice may issue warrant to search for property, *ib.*
limitation of prosecutions to three months, *ib.*
party aggrieved may be a witness, 136, 137.
when so, penalty applied to county rate, 136, 137.
provisions as to proceedings for penalty, 137.
and distribution of penalty, *ib.*
punishment when penalty not paid, *ib.*
scale of punishment, 138.
when justice may discharge offender on his making satisfaction to the party grieved, *ib.*
the King may pardon offender, *ib.*
on payment of penalty or suffering imprisonment, party relieved from all further proceedings, *ib.*
form of conviction, *ib.*
when conviction before *one* justice party may appeal, *ib.*
proceedings on appeal, 138, 9.
conviction not to be quashed for want of form, 139.
or removed by certiorari, *ib.*
no warrant of commitment void, when, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued*).
conviction to be returned to the quarter sessions, 139.
when evidence in future cases, *ib.*
protection of parties acting in execution of act, *ib.*
actions, &c. against, must be laid and tried in county where committed, *ib.*
must be commenced within six calendar months, *ib.*
one calendar month's notice requisite, *ib.*
defendant may plead general issue, *ib.*
may tender amends, *ib.*
or pay money into court, *ib.*
costs, *ib.*
construction of act, 144.
Thirdly, for *small wilful* or *malicious injuries* to property, under 7 & 8 G. 4. c. 30, 139.
provisions of act, *ib.*
proceedings may be before *one* justice, 139, 140.
who may order compensation not exceeding 5*l.*, 140.
to be paid to party aggrieved, unless a witness, 140, 1.
if not paid, imprisonment, with or without hard labor, not exceeding two months, 140.
act not to apply, when, *ib.*
not essential to prove malice, *ib.*
persons *found committing*, may be apprehended without warrant, *ib.*
prosecutions to be commenced within three months, 141.
party aggrieved may be a witness, *ib.*
charge must be upon oath, *ib.*
abettors liable to same punishment as principal, *ib.*
distribution of penalty when party aggrieved a witness, *ib.*
scale of punishment, *ib.*
discharge of offender on satisfying party aggrieved, *ib.*
King may pardon offender, *ib.*
no further proceedings for same cause, *ib.*
form of conviction, 142.
party aggrieved may appeal, *ib.*
proceedings on appeal, *ib.*
conviction not to be quashed for want of form, *ib.*
or removal by certiorari, *ib.*
or commitment held void, when, 142.
convictions to be returned to quarter sessions, *ib.*
when evidence in future cases, *ib.*
provisions for persons acting *bona fide* under act, *ib.*
construction of act, 144.
Fourthly, under Game Act, 1 & 2 W. 4, c. 32, 142.
penalties under, 142, 3.
distribution of penalty, 143.
form of conviction, *ib.*
proceedings for penalties, *ib.*
construction of act, 146.
similarity of the several statutes of this nature, *ib.*
conviction or commitment under, when valid, 146.
Practical proceedings to enforce compensation or penalties, 147.
First, *within what time* an information must be exhibited or commenced, *ib.*
provisions of different statutes, *ib.*
month, how construed, *ib.*
when the first day to be included, 148.
decisions contradictory, *ib.*
Secondly, *who to prosecute*, 149.
enactments of the different statutes, 149, 150.
requisites to be observed by party proceeding, 150, 1.
summary proceedings on justice's own view, 151.
Thirdly, *against whom*, 151.
enactments of the statutes in this respect, 151, 2.
Fourthly, *before what justice or justices*, 152.
should be before justice or justices of county where offence committed, *ib.*
when *one* justice may adjudicate, 153.
when *two* are requisite, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)
proceedings before one justice, when void, 153.
information in general by one justice, 154.
though final judgment by two, *ib.*
justices not to be interested, *ib.*

Fifthly, of the *information or complaint*, 155.
the form and strictness required in general, *ib.*
form of information, 156.
substance of, varies according to nature of complaint, 157.
what defects in aided, 158.
information may be sustained in part though bad as to residue, 158.
surplusage, when it will not prejudice, *ib.*
substance of the usual form of information, *ib.*
when must be in writing, *ib.*
when on oath, 159.
unnecessary if statute does not require it, *ib.*
though addition will not prejudice, *ib.*
when required, illegal to act without it, *ib.*
information may be brought to the justice ready prepared, *ib.*
name and description of the complainant or informer, 160.
must be in the name of the proper complainant, &c. *ib.*
time of exhibiting the information, 161.
place of exhibiting same, *ib.*
statement of magistrate's name and jurisdiction, *ib.*
name and description of offender, 162.
must be stated accurately, *ib.*
or conviction would be void, *ib.*
time of committing offence, *ib.*
advisable to state real day, *ib.*
proof need not correspond with day named, *ib.*
place of committing of offence, 163.
when local description essential, *ib.*
when not, *ib.*
when conviction will be quashed for want of, 163, 4.
description of the offence, 164.
what particularity requisite, 164, 5.
when information on oath merely in the words of the statute will not suffice, 165.
should be as extensive as the facts will warrant, *ib.*
must charge an offence equal to that prohibited either in the express words of act or substantially so, 166.
must be positive, and not by way of recital, *ib.*
must not be argumentative, *ib.*
nor in the alternative, *ib.*
when particular words of statute essential, *ib.*
averments negativing, when necessary, 166, 7.
conclusion, when should be *contra formam statuti*, 168.
when *contra pacem*, 169.
when may contain several counts varying descriptions, &c. *ib.*
prayer that the offender be summoned, 170.
defects in information when and how aided, *ib.*
forms of information, 170, 1, 2. See *Forms.*

Sixthly, *oath or deposition to obtain summons*, 171.
form of oath to obtain a summons, 173.

Seventhly, duty of a justice to *receive an information* and issue process thereon, 173.
when charge clear ought to hear information, &c. *ib.*
or Court of K. B. will compel him by mandamus, *ib.*
but not when jurisdiction doubtful, 174.

Eighthly, *the summons*, 174.
When it should issue before warrant, *ib.*
should be signed by justice himself, 175.
what it should contain, *ib.*
how directed, *ib.*
when it would be void, 176.
when appearance cures defect of, *ib.*
form of summons, 177.

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)
Ninthly, service of same, 177.
what necessary, 177, 8.
Tenthly, of the warrant to apprehend, 178.
enactments as to *transient* offenders, *ib.*
justice may issue in first instance, when, 178, 179.
must be on oath of credible witness, 178.
advisable to issue summons in first instance, *ib.*
unless offender likely to abscond, *ib.*
when statute implies authority to use compulsory means, 179.
form of warrant to apprehend, to answer a summary complaint or information, *ib.*
Eleventhly, of the search warrant, 179.
formerly could only be issued where a felony, &c. had been committed, 179, 180.
and if obtained maliciously, parties obtaining and acting under it, liable to action on the case, 180.
if illegal in form, justice liable to action of trespass, *ib.*
modern enactments respecting, *ib.*
may now be issued on oath of credible witness and proof of reasonable cause to suspect, *ib.*
course of proceedings under, *ib.*
should in general only authorize search in day-time, *ib.*
caution to be observed before issuing it, 180, 1.
Twelfthly, of securing evidence and attendance of witnesses, 181.
should be considered before hearing, *ib.*
doubtful whether justices out of session can summons witnesses, unless under express enactments, *ib.*
cannot *enforce* attendance, *ib.*
provisions of 1 & 2 W. 4, c. 32, in this respect, *ib.*
omission of in other acts, *ib.*
jurisdiction of justices imperfect for want of power, *ib.*
proper course for justices to issue summons to each witness, 182.
under Game Act witness refusing to attend, or refusing to answer, penalty 5*l.*, *ib.*
form of summons, *ib.*
Thirteenthly, hearing and proceeding before one or two justices, 182.
parties should be ready at appointed hour, *ib.*
justice should be punctual, *ib.*
proceedings before conviction considered, *ib.*
1. Jurisdiction and number of justices, 182, 3.
when one justice may adjudicate, 183.
when two are essential, *ib.*
in general, *one* may receive information, issue summons or warrant, *ib.*
though hearing and conviction must be before *two*, *ib.*
advisable to be before two, *ib.*
enactments of different statutes must be considered, *ib.*
2. Non-attendance of defendant and proof of due service of summons, 184.
should be satisfied of due service of summons before he proceeds ex parte, *ib.*
if service doubtful, should issue fresh summons, *ib.*
necessity for regularity when proceeding ex parte, *ib.*
especially as regards the evidence, *ib.*
3. Of confessions, 184.
when sufficient, *ib.*
when it does not aid defect in information, 185.
4. Of adjournments, 185.
when justice may adjourn, *ib.*
care to be observed before adjourning, *ib.*
5. Reading information to defendant, and his objections thereon, 185.
right of defendant to have information read when in writing, 185.
or substance stated to him when not in writing, *ib.*
if defective, defendant may object in first instance, *ib.*
and if justice proceeds, he does so at his peril, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)
hearing must be confined to the terms of the charge in information, 185.
when defendant should disclose his objections, 185, 6.
6. Right to appear by counsel or attorney, 186.
in preliminary examination not allowed *of right*, *ib.*
but may of right have the *private assistance* and attendance of counsel or attorney, 186.
but not to interfere as an advocate, *ib.*
7. Right of third persons uninterested to be present, but not to take notes, 187.
when justice would be liable for expelling person from justice-room, 187.
may prohibit the taking of notes, *ib.*
except on behalf of informer or defendant, *ib.*
if party persist, may be removed, *ib.*
8. The evidence and witnesses, 188.
sometimes express directions given by statutes, *ib.*
when party aggrieved may be a witness, *ib.*
when informer may, *ib.*
when not, *ib.*
9. Oath of witness, 188.
to be administered as on trial of an action, *ib.*
on summary proceedings evidence must be on oath, *ib.*
if not on oath, justice liable to a criminal information, *ib.*
when justice may commit for refusing to take oath and give evidence, 188.
when not, *ib.*
when he would be liable to an action of trespass for so doing, 189.
conviction, when it would be quashed for refusing to hear a witness, *ib.*
10. Mode of examination, &c. 189.
should be conducted as in Courts of Law, *ib.*
leading questions should not be put, *ib.*
but full investigation of truth should be obtained, *ib.*
11. Mode of taking evidence, 189.
in summary proceedings should be taken down verbatim, *ib.*
at least all the words material, 190.
but not in the words of the statute, *ib.*
should be read over to witness, *ib.*
should not be taken before witness has been sworn, *ib.*
provisions of 3 Geo. 4, c. 23, as to statement of evidence in the conviction, *ib.*
omission to do so, justice may be compelled by mandamus, *ib.*
evidence must state the facts, and not merely the result, *ib.*
when must show *particular grounds* of forfeiture, 190, 1.
if stated in terms different from substance, justice liable to criminal information, 191.
12. The defence, 191.
when on a criminal charge, what course the justice should pursue, *ib.*
13. Evidence in support of defence, 191.
when under *bonâ fide* claim of right, *ib.*

Fourteenthly, Postponing the decision of the justices, and presence of, at the time of deciding, 192.
may take time to consider, *ib.*
if two justices must convict, decision must be given in presence of both, *ib.*
and should give defendant notice when they will decide, *ib.*
when Court of King's Bench will interfere, *ib.*
if proof doubtful, defendant should have the benefit, and be acquitted, 193, 4.

Fifteenthly, Amicable adjustments and compromises by intervention of justices, 193.
when they may interfere, 193, 4.
or allow a compromise, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)
enactments in this respect, 193, 4.
when parties liable for compromising, 193.
Sixteenthly, Decision of the justices, 194.
1. *Acquittal*, and record or certificate thereof, *ib.*
form of acquittal, *ib.*
2. *Certificate* of dismissal, 195.
form of certificate, *ib.*
3. *Conviction*, 195, 6, 7.
what it should contain, 196.
should be deliberate, *ib.*
but be completed with *due expedition*, *ib.*
when defendant has a right to copy of, 197.
should be returned to quarter sessions, *ib.*
when justice liable for neglect, *ib.*
formal parts and requisites of, *ib.*
form of, *ib.*
in what respects imperative, and consequences of deviation, 198.
recital of information, *ib.*
usually in the past tense, *ib.*
recital of appearance and defence, 199.
should be stated according to fact, *ib.*
recital of confession, *ib.*
of evidence, *ib.*
enactments in this respect, *ib.*
mode in which evidence should be stated, 200.
evidence of each witness should be stated separately, *ib.*
and in the *precise* words of witness, *ib.*
and not merely the *result*, *ib.*
may be compelled to do so by mandamus, 201.
Statement of the *defence and evidence for defendant*, 201.
how to be stated, *ib.*
what evidence on face of conviction will suffice, 202.
the form of *adjudication* in general, *ib.*
what necessary, 203.
form prescribed in 3 Geo. 4, c. 23, *ib.*
should appear that a judgment was pronounced, *ib.*
must be precise and certain, *ib.*
when it should negative exceptions, *ib.*
what statement of the offence necessary, 204.
or of defendant's avoiding objections, *ib.*
must observe certainty in stating offence, 205.
when uncertainty in information aided by conviction, *ib.*
statement of conviction of several offences, *ib.*
of adjudication as to forfeitures, penalties, &c., 206.
as to costs, 207.
conclusion of conviction, 208.
the date, *ib.*
signing and sealing, *ib.*
Convictions upon particular statutes, 209.
when must be in words prescribed by statute, *ib.*
when may vary, *ib.*
defects in, when aided, 210.
delivery of copy of conviction, and returning same to sessions, 211
enforcing payment of penalty or punishment, 212.
when Court of King's Bench will compel justice to do so, *ib.*
when not, *ib.*
mode of enforcing same by distress warrant, &c., *ib.*
can only be done by express enactment, 212, 3.
and no replevin lies, 213.
may sell goods distrained under, *ib.*
Seventeenthly, Commitments, 213.
should strictly pursue the conviction upon which they are founded, *ib.*
deviation from, justice liable to action of trespass, 214.
must be in writing, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)
and not verbal, 214.
when demand of penalty should be made before commitment, *ib.*

Eighteenthly, Of Appeals to the sessions, 214.
1. When may be made, 214, 5.
cannot unless expressly or impliedly given by statute, 215.
justice's duty in respect of, 215.
2. *Recognizance*, 215.
to prosecute appeal, *ib.*
form of, *ib.*
form of judgment of affirmance of appeal, 216.
3. *Notice of appeal*, 216.
must explicitly state all the objections, 216, 7.
when must be served, 217.
when sessions quashing conviction not conclusive, *ib.*

Nineteenthly, Mandamus to compel justices to state evidence, &c. in conviction, under 3 G. 4, c. 23, 218.
when Court of K. B. will grant, *ib.*
proceedings to obtain same, *ib.*

Twentiethly, Certiorari, 219.
1. Lies as a matter of right, *ib.*
unless expressly taken away by statute, 219, 220.
when conviction may be removed by, 219, 220.
course to pursue, when certiorari taken away, 220.
within what time it must be moved for, 221.
2. What *notice* thereof required, 221, 222.
what it must contain, 222.
who must sign it, *ib.*
affidavit of service of notice must be made, *ib.*
how to be entitled, *ib.*
notice should specify grounds of objection, 223.
affidavit of service of notice of motion, *ib.*
3. *Affidavit* in support of motion for certiorari, 223.
how to be made, *ib.*
objections should be stated in affidavit, *ib.*
form of affidavit in support of motion, 224.
grounds on which Court will grant or refuse application, *ib.*
Recognizance to prosecute certiorari with effect, and pay penalty and costs in case of affirmance, 225.
must be entered into with two sureties, *ib.*
enactment of 5 G. 2. c. 19. s. 2, *ib.*
in what sum sureties to be bound, *ib.*
Affirmance of, or quashing conviction in K. B., 226.
if affirmed, defendant to pay costs, *ib.*
unless magistrate has refused a copy, *ib.*
if quashed, defendant entitled to have recognizance discharged, *ib.*
not entitled to costs on certiorari, if decision in his favor, *ib.*
but is on appeal in his favor, *ib.*
reason for this distinction, *ib.*
Execution to enforce conviction after being affirmed, 226.
Liability of complainant or informer, 227.
in general not liable if acting *bona fide*, *ib.*
unless acting through malice, *ib.*
liability for obtaining search warrant, *ib.*
in cases of a felonious charge, when, *ib.*
not liable for error of justice, 228.
Liability of Justices, 228.
when acting without jurisdiction, 228, 9.
or without sufficient oath of crime committed, 228.
or keeping party too long in custody, *ib.*
committing party under Vagrant Act without hearing witnesses, *ib.*
or committing for different offence than stated in conviction, *ib.*
enactments of recent acts, 228, 9.
for committing party when facts do not warrant his proceeding, 229.

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)
when protected by conviction not being quashed, 229.
when may be proceeded against by mandamus, *ib.*
when by criminal information, *ib.*
Protection to Justices, 230.
enactments in this respect, *ib.*
notice of action must be given, *ib.*
action, when to be commenced, *ib.*
may tender amends, *ib.*
or pay money into Court at any time before trial, *ib.*
enactments as to form of action, *ib.*
Thirdly, in cases of *Forcible Entry and Detainer*, 231.
right of justices to interfere, *ib.*
what a forcible entry, 232, 3, 4.
even by party having a right to possession, 232.
how he should act, *ib.*
cannot take possession by force, *ib.*
when party may safely act without assistance of a justice, 233.
court of equity, in cases of wrongful possession, will grant injunction to prevent waste pending legal proceedings, *ib.*
jurisdiction of justice, *ib.*
founded on statute law, *ib.*
two descriptions of forcible ousters, *ib.*
1. forcible entry and expulsion, *ib.*
2. forcible detainer, where entry not forcible, but illegal, *ib.*
who may be guilty of a forcible entry or detainer, *ib.*
what constitutes a forcible entry, 234.
1. Forcible entry and forcible detainer after such entry, 234.
defined and prohibited by statute, *ib.*
when justices may proceed to give possession, *ib.*
when not, *ib.*
must have *view* of continuing force, 234, 5.
when jury must be empannelled to try forcible entry, 234.
upon finding of force, justice may then proceed, *ib.*
when he may break open doors, 235.
and cause offenders to be arrested, *ib.*
justice's duty on finding force, *ib.*
proceedings in case there is no continuance of the force in view of justice, *ib.*
2. *Forcible Detainer*, 236.
proceedings under, *ib.*
enactments respecting, 236, 7.
justice cannot act where wrong-doer has been continually in possession for three years, 237.
what a forcible detainer, 238.
may be whether entry forcible or not, *ib.*
instances of forcible detainer, *ib.*
between landlord and tenant, *ib.*
when conviction by justices insufficient, for not stating that the *entry* was *illegal*, 238, 240.
decisions of the judges as to what is an illegal entry under 8 H. 6, c. 9, 238, 9.
when tenant holding over guilty of illegal entry, 239.
in these cases prudent to try right in a civil action, *ib.*
Practical Proceedings in cases of forcible entry and detainer, 240.
statutes give jurisdiction to *one* justice, *ib.*
most prudent for *two* to act, *ib.*
complainant should be sworn as to his right to estate, and of the forcible or illegal entry, *ib.*
or conviction not shewing that entry illegal, would be bad, *ib.*
when case doubtful, justice should not act, *ib.*
but leave party to try right, *ib.*
or should issue warrant to sheriff to impannel a jury, *ib.*
when offenders may traverse finding of justices, *ib.*
restitution should not be awarded before the jury have found force, 241.
or defendant decline traversing, *ib.*
complainant not to be a witness, *ib.*
justices to give restitution on finding of force, *ib.*

JUSTICES OF THE PEACE, Summary Proceedings before—(*continued.*)
and draw up record of proceedings, 241.
Certiorari to remove conviction, *ib.*
six days' notice of motion to be given, *ib.*
notice must state objections, *ib.*
proceedings same as in other cases of certiorari, *ib.*
Fourthly, In other cases between landlords and tenants, 241.
1. *Premises deserted, and rent in arrear, and no sufficient distress*, *ib.*
enactments in this respect, 242.
jurisdiction given to justices, *ib.*
power of appeal, *ib.*
costs on appealing, *ib.*
to what tenancies the statutes apply, *ib.*
four circumstances must concur, 242, 3.
1. a tenancy at not less than three fourths of the annual value, 243.
2. at least half a year's rent in arrear, *ib.*
3. a desertion by the tenant, *ib.*
4. neither tender of rent, nor a sufficient distress, *ib.*
practical proceedings in these cases, *ib.*
application usually in writing to two justices of the county, *ib.*
complaint need not be on oath, *ib.*
on first view, justices to affix notice, 244.
requisites of notice *ib.*
on second view justices to give possession if defendant does not appear, &c., *ib.*
what *desertion* essential, *ib.*
justices should enquire fully into the facts, 245.
provisions of 11 G. 2. c. 19, as to justices' proceedings, *ib.*
justices not liable for proceedings, *ib.*
when landlord would be liable, *ib.*
2dly, *Cases of Fraudulent Removal* to avoid distress, 245.
provisions of 11 G. 2. c. 19. s. 4, *ib.*
complaint must be in writing before two justices, *ib.*
justices to summon parties concerned, 246, 7.
examination to be on oath, 246, 7.
value of goods removed to be ascertained, 246.
and parties offending to pay double the value, *ib.*
refusal to do so, a distress warrant to issue, *ib.*
default of distress, party to be committed for six months, *ib.*
party appealing must enter into recognizance, &c., *ib.*
order to be stayed pending appeal, *ib.*
what a fraudulent removal, 246, 7.
jurisdiction of justices, 247.
requisites of the order, *ib.*
advisable to be drawn up with same precision as a conviction, 248.
oath and warrant to authorize the breaking a dwelling-house to seize goods fraudulently removed, *ib.*
enactment of 11 G. 2, c. 19, s. 7., *ib.*
caution to be observed before granting, 248, 9.
3dly, *Paupers retaining Parish Property*, 249.
enactment of 59 G. 3, c. 112, s. 24, *ib.*
proceedings under, *ib.*
4thly, *Excessive Costs of Distress*, 250.
enactment of 57 G. 3, c. 93., *ib.*
when charge unlawful, justice to summon party, *ib.*
on proof of charge, to adjudge treble the amount of money unlawfully taken, *ib.*
with costs, to be levied by distress, *ib.*
other provisions of act, 250, 1.
5thly, Summary Proceedings before Justices under the *Custom and Excise Laws*, 251.

KING.
under 7 & 8 G. 4, c. 29 and 30, may remit penalty or imprisonment of offenders, 138, 141.

LABOURERS AND SERVANTS,
claims for and against, when referred to arbitration, 74.

LANDLORD AND TENANT. See *Justices of the Peace.*
summary proceedings by, in cases of forcible entry and detainer, 238.
proceedings of justices, 241 to 251.
1. Where rent in arrear and premises deserted, 241.
2. In cases of fraudulent removal to avoid distress, 245 to 248.
3. Where pauper holds over after permission withdrawn, 249.
4. Excessive charges upon a distress for less than 20*l.*, 250.

LEGAL QUALIFICATION. See *Attorney and Solicitor.*
how the want of in an attorney, &c. may affect client, 15, 16.
penalty of 50*l.* for acting without regular admission, 15.
presence of uncertificated attorney, when insufficient, 16.
prudence of ascertaining that party is attorney of proper court, *ib.*

LETTER.
propriety of writing before litigation, 56.
unless party likely to abscond, *ib.*
charge of, formerly not allowed, *ib.*
but now otherwise, *ib.*
terms of such letter, *ib.*

LIABILITY OF ATTORNIES. See *Attorney and Solicitor.*
in general, not liable where point of law doubtful, 21, 32.
when acting under counsel's opinion, 21, 32.
liable for practical errors, 33.
in these cases remedy by action, *ib.*
court will not summarily interfere, *ib.*
unless when guilty of want of integrity, *ib.*
and then although no suit, &c. pending, *ib.*

LIABILITY OF JUSTICES, 228. See *Justices of the Peace.*

LIBEL.
in actions for in the newspapers, who to be defendants, 48.
names of proprietors ascertained at stamp office, *ib.*
certified copy of affidavit filed at stamp office evidence of liability, *ib.*
but this only to proprietor or publisher, *ib.*
printer, on giving up author, ground of mitigation of damages, *ib.*
and suit against him should be abandoned, on payment of costs, 49.

LIEN.
when goods deposited by way of, should be stipulation for power of sale, 59, 60.
when attorney, &c. should give notice to secure his lien, 69.

LIMITATION.
of prosecutions under 7 & 8 G. 4, c. 29. to three months, 136.
of actions against parties bonâ fide acting under the same, six months, 139.
of prosecutions under 7 & 8 G. 4, c. 30, three months, 141.
commencement of. See *Proceedings between Retainer and Litigation.*
consideration of subject in general, 46 to 72.

MAGISTRATES. See *Justices of the Peace.*

MALICIOUS INJURIES TO PROPERTY.
summary proceedings for, 139. See *Justices of the Peace.*
provisions of act, 7 & 8 G. 4, c. 30, 139.
proceedings may be before *one* justice, but preferable before two, 139, 140.
who may order compensation, 140.
party aggrieved may be a witness, 140, 141.
act not to apply, when, 140.
not essential to *prove* malice, 140.
persons found *committing* may be apprehended without warrant, 141.
distribution of penalty, *ib.*
scale of punishment, 141.
form of conviction, 142.
party aggrieved may appeal, *ib.*

MANDAMUS.
when it lies against justice, 190, 201, 229, and see *Justices of the Peace.*
when court of K. B. will grant, 190, 201, 218, 229.
proceedings to obtain same, *ib.*

MARRIED WOMAN.
cannot consent to a reference, 77.

MARRIAGE.
bill to discover promise of, lies, 52.

MASTER OF ARTS.
taking degree of, entitles clerk to admission as an attorney, &c. after service of three years, 8.
same exception in favour of students for the bar, 38.

MEMORANDUM.
bill of discovery lies to compel a party to admit having signed one to avoid the statute of limitations, 53.

MONTH.
how calculated, 69, 147.
when exclusive of first day, *ib.*

MORTGAGE.
goods deposited by way of, should stipulate for power of sale, 59, 60.

NEGOCIATIONS.
duty of attorney, &c. in respect of, 24.
should be conducted with candour and liberality, *ib.*
when communication should be restricted, *ib.*
when there should be no concealment, *ib.*
when attorney, &c. will have to pay costs for concealing facts, *ib.*

NEIGHBOURS.
in actions between, respecting nuisances, &c. proper to refer, 75.

NEWSPAPERS.
for libels in, who to be defendants, 48.

NON-ATTENDANCE.
of party, when arbitrator may proceed ex parte, 82.
of defendant, when justice may proceed ex parte, 184.
recital of, in conviction, 199.

NON-JOINDER, 51, 52. See *Abatement.*
of parties in cases of contracts, 51.
defects of former law remedied, 52.
plea of non-joinder ineffectual, where omitted party resides out of the kingdom, *ib.*

NOTARIES.
a description of law agent, 36.
antiquity of, *ib.*
exist in every state of Europe, *ib.*
peculiar weight and respect attached to their acts, *ib.*
must serve by indentures of apprenticeship for seven years, *ib.*
such indenture must be duly stamped, *ib.*
such service must be *bona fide* during whole term, *ib.*
what not a sufficient service, *ib.*
may stipulate to pay part of profits to widow or family of deceased partner, 41 G. 3, c. 76; and see more fully, *Candler* v. *Candler*, 1 Jac. Rep. 231, 2.
to practise, must obtain a faculty, 36.
if guilty of misconduct, may be struck of the Roll of Faculties, *ib.*
penalty of 50*l.* for practising without being admitted, *ib.*
provisions of the statutes respecting, 37.
when any attorney or solicitor may practise as notary, *ib.*
by 44 G. 3, c. 98, may draw deed, conveyance, &c. *ib.*
but not be concerned in any suit, *ib.*

NOTICE.
of intention to apply for admission to practise as an attorney, &c. 5.
must be affixed outside the Court, *ib.*
and entered at Judge's chambers, *ib.*
of lien, when necessary, 69, 70.

NOTICE OF ACTION. See *Justices.*
precautions to be observed in giving, 60.
of action, and requisites, 63.
regulations with respect to notices in general, *ib.*
to justices in particular, *ib.*
provisions of 24 G. 2, c. 44, with respect to, *ib.*
decisions on the statutes, 64.
the intended writ must be stated, 65.
what it must state, *ib.*
precision and technicality not requisite, 65.
recommended form of, *ib.*

NOTICE OF ACTION (*continued*).
should be nearly in form of subsequent declaration, 67.
legal objections need not be stated, *ib.*
form of action need not be stated, *ib.*
to whom to be addressed, *ib.*
on whom to be served, *ib.*
indorsement on notice of attorney's name and abode, 68.
why requisite, *ib.*
what a sufficient description, *ib.*
under 7 & 8 G. 4, c. 29 and 30, one calendar month's notice of must be given, 139, 141.

NOTICE OF APPEAL.
when appeal may be made, 214.
must explicitly state all the objections, 216, 217.
when must be served, 217.

OATH.
to be taken by clerk on admission to practise as attorney, &c. 5.
only to be administered when Judge satisfied of fitness, 5, 13.
form of, to obtain a summons, 173. See *Justices of the Peace.*
before summons requisite, under four recent acts, 173, 4.
form of, 173.
warrant to apprehend must be on oath of credible witness, 178.
search warrant must be obtained on oath, 180.

OFFENCE.
how to be stated in information, 164 to 168. See *Justices of the Peace.*
how to be stated in conviction, 205. See *Justices of the Peace.*

ORDER OF REFERENCE. See *Arbitration.*
when may be amended, 89.
when may be revoked, 102.

PARTNERS.
one of several may consent to a reference, but not to bind his partners, 77.

PART PAYMENT.
when proposal of, may be accepted, 59.

PARTY AGGRIEVED.
when he may be a witness, 136, 7.
when so, penalty applied to county rate, &c. 137, 141.

PENALTY. See *Justices of the Peace.*
proceedings for, under 7 & 8 G. 4. c. 29 & 30, 135, 139.
party aggrieved may be a witness, 136, 7.
when so, penalty applied to county rate, &c. 136, 7
provisions as to proceeding for, 137.
distribution of, *ib.*
punishment when penalty not paid, 138.
form of conviction for, *ib.*
when the King may remit, *ib.*
proceedings for under 1 & 2 W. 4. c. 32, 142.
practical proceedings to enforce, 147.

PERJURY.
party guilty of false swearing before arbitrator, guilty of perjury, 98.
formerly otherwise, 98, 100.

PERUSAL OF WARRANT.
when demand of, should be made, 62.
when unnecessary, *ib.*

PETITION.
in cases of difficulty articled clerk may petition Court, 5, 13.
whose decision will be final, 13.
and no court of appeal or higher tribunal, *ib.*

PHYSICS AND NATURAL PHILOSOPHY.
study of, particularly recommended, 14.

PIGEON.
penalty for killing or wounding of, 136.

PLAINTIFF.
considerations who to be, 47, 48.
how to discover proper party, 47, 48.

PLAINTIFF—(*continued*).
who to be, in action of ejectment, 47.
assignee of bond or chose in action must sue in name of obligor, *ib.*

PLEADINGS.
barrister's, &c. duty with respect to, 44, 45.
should not be incumbered with unnecessary statements, 44.
or contain complicated counts or pleas, *ib.*
though sometimes unavoidable, *ib.*

POSSESSION. See *Forcible Entry and Detainer. Justices of the Peace.*
summary proceedings before justices, when withheld by forcible entry and detainer, 231 to 242.

PRACTICE. See *Attorney and Solicitor.*
attorney, &c. liable for errors in, 33.

PRECAUTIONARY PROCEEDINGS.
between retainer of attorney and commencement of legal proceedings, 46 to 72. See tit. *Proceedings between Retainer and Commencement of Litigation.*

PRECEDENTS. See *Forms.*

PREMIUM.
articles of clerkship should contain covenants for return of, in case of death of master, 9.
or other event, *ib.*
when Court of K. B. will compel return of, 10.
without resorting to a court of equity, *ib.*

PRINTER.
of libel giving up author, ground of mitigation of damages, 49.
suit against him should be abandoned on payment of costs, *ib.*

PROCEEDINGS BEFORE JUSTICES. See *Justices of the Peace.*

PROCEEDINGS BETWEEN RETAINER AND COMMENCEMENT OF LITIGATION, 46 to 72.
consideration of subject in general, 46.
Fifteen steps may be necessary, as follows, 46 to 72.
First, ascertain the party injured, and who to sue, 47, 48.
sometimes difficult to determine, 47.
in actions of ejectment, on whose demise, *ib.*
cannot be on demise of cestui que trust, *ib.*
but must be on demise in name of trustee, *ib.*
assignee of bond or chose in action must sue in name of obligee, *ib.*
except on a bill or note, *ib.*
who to sue and be sued requires consideration, *ib.*
as error would in general be fatal on trial, *ib.*
attorney should secure proper authority to sue, *ib.*
duty of executors and administrators where claimant unknown, *ib.*
and expediency of public advertisements, *ib.*
course to pursue when title deeds, &c. in possession of agent, &c., 48.
Secondly, who to be sued, 48.
sometimes difficult to determine, *ib.*
as in the case of malicious injuries, *ib.*
necessity of sufficient discovery before proceeding, *ib.*
in cases of torts or contracts, advisable to advertise, *ib.*
but must avoid libellous expressions, *ib.*
for a libel in newspaper, by referring to affidavit filed at Stamp Office, *ib.*
certified copy of which, evidence of liability, *ib.*
but this only to proprietor or publisher, *ib.*
when against stage coach proprietor, *ib.*
printer of libel giving up author, ground of mitigation, *ib.*
and suit against him should be abandoned on payment of costs, 49.
of bill to perpetuate testimony when wrong doer unknown, *ib.*
difficulties in cases of contracts, *ib.*
of writing letter to party supposed to be liable, *ib.*
either to make compensation, *ib.*
or to disclose name of offender, *ib.*
when necessary to file bill for discovery, *ib.*
when parties would be bound to answer, *ib.*
when landlord may file a bill for discovery against tenant, *ib.*
when not, *ib.*

PROCEEDINGS BETWEEN RETAINER AND COMMENCEMENT OF LITIGATION—(*continued.*)
bill lies against lessee and mortgagee, when, 50.
of the *right* to obtain a discovery of the parties to be made defendants, *ib.*
would not be enforced when on face of bill *no remedy*, *ib.*
of joining defendants in actions of trespass, 51.
when acquitted, defendants, by 8 & 9 W. 3. c. 11, entitled to costs, *ib.*
entitled, unless judge certify to contrary, *ib.*
provisions of that statute extended to all *personal actions*, *ib.*
duty of attorney to ascertain precise parties, *ib.*
of the parties in cases of contracts, *ib.*
in the case of nonjoinder *ib.*
defects of former law remedied, 52.
plea of nonjoinder ineffectual where omitted party resides out of kingdom, *ib.*
Thirdly, of the cause or ground of action, and how to be ascertained, 52.
duty of attorney to ascertain this, *ib.*
when bill of discovery should be filed, *ib.*
as to compel defendant to admit or deny a promise of marriage, *ib.*
or having signed memorandum, *ib.*
or to discover assets, *ib.*
or to exhibit an account of assets and expenditure in the Ecclesiastical Court, 53.
doubtful whether it lies to discover whether a particular person exists, *ib.*
or where he resides, *ib.*
provisions of 6 Ann, c. 18, to discover death of party, *ib.*
Fourthly, ascertaining the evidence, 53, 212.
should be ascertained in first instance, 53.
even before intimation to opponent of intended litigation, 53.
duty of attorney in this respect, *ib.*
his liability in case of negligence, *ib.*
danger of relying merely on client's statement, *ib.*
safest course to examine the principal witnesses, *ib.*
when bill for a discovery may be filed against defendant, 54.
or to perpetuate testimony, *ib.*
Fifthly, of *bills for discovery*, and costs thereon, 54.
principal points in connexion with proceedings considered, *ib.*
when bill prays only a discovery, and not relief, plaintiff not to have costs, *ib.*
but defendant entitled to his costs, *ib.*
reason for this rule, *ib.*
when a different rule would prevail, *ib.*
Sixthly, demand of a *legal security* in lieu of one defective, 55.
essential to know if written security sufficient, *ib.*
and properly stamped, *ib.*
when bill necessary to enforce delivery of proper security, *ib.*
when may sue at law for not giving it, *ib.*
demand of one should be first made, *ib.*
when stamp omitted, may be impressed at any time, 56.
except in cases of bills and notes, *ib.*
better to delay that expense until necessary, *ib.*
Seventhly, Attorney's letter before action, 56.
propriety of doing so considered, *ib.*
unless party likely to abscond, *ib.*
omission engenders angry feelings, *ib.*
formerly charge of such letter not allowed, *ib.*
but now otherwise, *ib.*
terms of such letter, *ib.*
when demand of interest should be made, 57.
form of such demand, *ib.*
at law, demand of the precise sum not material, *ib.*
but otherwise in equity, *ib.*
when costs will be given where demand excessive, *ib.*
Eighthly, Of Proposals for an *Apology* or *Compromise*, 57.
propriety of asking for apology or compromise, *ib.*
duty of attorney to afford opportunities for, *ib.*
humiliating one should not be asked, *ib.*

PROCEEDINGS BETWEEN RETAINER AND COMMENCEMENT OF LITIGATION—(*continued.*)
compromise may be invited on both sides, 58.
should be *bonâ fide* and fairly conducted, *ib.*
costs sometimes affected by, *ib.*
of compromise in criminal cases, *ib.*
in compromise at law, where several claimants must concur, *ib.*
different rule prevails in equity, *ib.*
when sufficient for majority to agree, 59.

Ninthly, Of *giving time*, and on what security, 59.
attorney bound to communicate offer to his client, *ib.*
when proposal of part payment may be accepted, *ib.*
when time given to principal, consent of surety should be obtained, *ib.*
or time given, on obtaining security of third person, the consideration should be mentioned, *ib.*
in case of several contracting, covenants should be several as well as joint, *ib.*
when goods deposited by way of mortgage or lien, should stipulate for power of sale, 59, 60.
when warrant of attorney or cognovit proposed, 60.
course to be observed in a case of general insolvency, *ib.*

Tenthly, Of Notices, Tenders, and Demands in general, 60.
when demand of goods, &c. advisable, *ib.*
when such demand should be repeated, *ib.*
precautions to be observed in giving notices in general, *ib.*

Eleventhly, Of *Demand* of perusal, and copy of *Justice's Warrant*, 61.
when should be made, 61, 2.
when officer is protected, 61.
when magistrate liable, *ib.*
when not, *ib.*
provisions of 24 G. 2, c. 44, *ib.*
form of demand, 62.
no demand necessary where party has not acted strictly in obedience to the warrant, *ib.*
when the immediate wrong doer should be proceeded against, 63.

Twelfthly, Of the *Notice of Action*, and requisites, 63.
enactments with respect to notices in general, *ib.*
notices to justices in particular, *ib.*
provisions of 24 G. 2, c. 44, *ib.*
decisions on the statutes, 64.
who a justice within the act, *ib.*
person illegally acting as a justice without qualification is not within the act, *ib.*
construction of words "done in the execution of his office," *ib.*
the intended writ must be stated, 65.
slight want of technicality will not prejudice, *ib.*
what facts and damage must be stated, *ib.*
no evidence allowed of cause of action not named in notice, *ib.*
precision and technicality not requisite, 66.
recommended form of notice, *ib.*
should be nearly in form of subsequent declaration, 67.
legal objections need not be stated, *ib.*
form of action need not be stated, *ib.*
but if stated, and subsequent declaration vary, the latter would be insufficient, *ib.*
to whom should be addressed, *ib.*
on whom served, *ib.*
indorsement on notice of attorney's name and abode requisite, 68.
why requisite, *ib.*
what description sufficient, *ib.*
provisions of the Customs and Excise Acts, *ib.*
other peculiar protections, *ib.*
when the month expires, 69.
general precautions, *ib.*

Thirteenthly, *Notice of Attorney's Lien*, 69.
when should be given, *ib.*
effect of such notice, 69, 70.

PROCEEDINGS BETWEEN RETAINER AND COMMENCEMENT OF LITIGATION—(*continued.*)
Fourteenthly, Selection of Remedy, 70.
importance of question, 70, 71.
an *arbitration* least hostile, *ib.*
summary proceedings before justices most expeditious and less expensive, 70.
or in Courts of Request, 70.
or by action at common law, *ib.*
or by indictment or information in Criminal Courts, *ib.*
Fifteenthly, Of *Retaining* Counsel, 71.
duty of attorney to consult client in this respect, *ib.*
should be effected without the least delay, *ib.*
which counsel to retain, *ib.*
of the number to retain, *ib.*
of the allowance for retainer in taxing, 71, 72.
general retainer, when should be given, 72.
not allowed in taxing, 72.

PROCTOR. See *Attorney and Solicitor.*
liable to the same regulations as to admission as attornies and solicitors, 34.
must serve five years under articles, *ib.*
must be examined and admitted, *ib.*
and obtain an annual certificate, *ib.*
prohibited from suffering unqualified person to use their names, *ib.*
cannot act as a justice of the peace, *ib.*
observations of Lord Stowell as to their duty, 23, 24, 34.

PROFESSIONAL BUSINESS.
when an attorney cannot charge for, 17.

PROMISE OF MARRIAGE.
bill of discovery lies to compel defendant to admit or deny a promise of marriage, 52.

PROOF OF FACTS. See *Evidence.*
duty of attorney to ascertain them, before proceeding, 21.
should be well assured of their sufficiency, *ib.*
Lord Tenterden's observations of attorney's duty in this respect, *ib.*
when attorney, &c. should take counsel's opinion on, 22.

PROPOSAL FOR TIME. See *Time.*

PROSPECTIVE MORTGAGE.
attorney, &c. cannot take, to receive *future* costs, 27.

PROTECTION TO JUSTICES, 230. See *Justices of the Peace.*

PROTHONOTARY.
service of articled clerk to, sufficient, 7.

PUBLIC LECTURES.
revival of, at the Inns of Court, recommended, 40.

PUBLICATION.
of an award, what, 115.

PURCHASER.
should not employ vendor's attorney, 17.

RECEIVER.
of stolen property punishable as principal, 136.

RECOGNIZANCE. See *Justices of the Peace.*
to prosecute certiorari with effect, &c., 225.
must be entered into with two sureties, *ib.*
enactments of 5 G. 2, c. 19, s. 2, *ib.*
in what sum sureties to be bound, *ib.*
to prosecute appeal against decision of justices, in cases of fraudulent removal of goods, 246.
if conviction quashed, entitled to have recognizance discharged, 226.

REMUNERATION. See *Attorney and Solicitor.*
stipulations by attorney, &c. out of usual course, illegal, 26.

REFERENCE. See *Arbitration, Reference to.*
when proper, 75.
in cases of intricate accounts, *ib.*

REFERENCE—(*continued.*)
or where necessary to refer to long documents, 75.
or to make or explain calculations, *ib.*
between neighbours respecting nuisances, ancient lights, &c., *ib.*
or upon title to land, if claim small, *ib.*
in investigating subjects of delicacy amongst relations, *ib.*
unless character injured, *ib.*
when improper, 75.
in cases of calumny, *ib.*
or criminal conversation, 75, 6.
in criminal matters, unless by consent of Court, 76.
in other cases, *ib.*
caution to be observed in terms of reference, *ib.*
who may refer, 77.
an infant or married woman cannot, *ib.*
one of several partners may, but not to bind his partners, *ib.*
agents in general must have express power to do so, *ib.*
at law, counsel or attorney may bind client by consenting to refer at nisi prius, *ib.*
in equity, solicitor cannot, unless by express authority, *ib.*
when executors, &c. may, *ib.*
should guard against personal liability, *ib.*
when assignees should refer, *ib.*
should guard against personal liability, 78.
utility of reference, to find facts for opinion of Court, 78.
by having facts concisely stated by arbitrator, *ib.*
parties enabled to do this by recent acts, *ib.*
distinctions between references at common law and under the statutes, 79.
at common law, may be verbal, *ib.*
or in writing, not under seal, *ib.*
or by specialty, *ib.*
or by rule or order of a Judge, *ib.*
enactments of 9 & 10 W. 3. c. 15, 80.
of 3 & 4 W. 4. c. 42. s. 39, 40, 41,—82.
submission to, and terms thereof, 85.
care in framing requisite, *ib.*
should stipulate that submission be made a rule of Court, 86.
should be made in writing, *ib.*
when by agent or trustee, to avoid personal liability, 87.
by executors, assignees, &c., 87.
of limiting power of arbitrator, *ib.*
when may be amended, 89.
making submission a rule of Court, 92.
when may be made, *ib.*
enlargement of time, 96.
proceedings before arbitrator, 97.
enforcing attendance of witnesses, 98.
examination of witnesses and evidence, 101.
mode of taking the evidence, 102.
when agreement to, may be revoked, *ib.*
provisions in agreement to refer as to costs, 109, 10.

REPLEVIN.
does not lie under a Justice's distress warrant for a penalty, 213.

RETAINER of Attorneys, &c., 1 to 20.
reasons why an admitted legal agent should be retained, 1 to 4.
of attorney or solicitor, 4.
rules for client's selection of attorney, 17, 18.
propriety of requiring a written retainer, 18.
formerly absolutely requisite, 19.
but not so now, *ib.*
omission to take one censured, *ib.*
and would create prejudice against attorney, *ib.*
observations of Lord Tenterden on this subject, *ib.*
should be given for the client's sake, *ib.*
and qualified according to deliberate intention of party, *ib.*
necessary, when on behalf of assignees of bankrupt, 20.
and should be signed by all of them, *ib.*
should stipulate to attorney's due care in ascertaining title, *ib*

RETAINER of Attorneys, &c.—(*continued.*)
with engagement to make satisfaction upon the discovery of any defect, 20.
this to avoid the Statute of Limitation, *ib.*
form of retainer on behalf of plaintiff, *ib.*
on behalf of defendant, *ib.*
duty of attorney to secure authority to sue or defend, from proper party, 47.

RETAINING COUNSEL. See *Counsel, retaining of.*
duty of attorney respecting, 71, 2.

REVOCATION of power of arbitrator. See *Arbitration, reference to.*

SALVAGE ACTS.
claims under, referred to arbitration, 74, 125.
but not preclude parties from suing, 125.

SAVING BANK ACT.
arbitration under compulsory, 74, 125.
parties precluded from suing, in cases within its enactments, 126.

SEAMEN'S WAGES.
claims for, referred to arbitration, 125, 74.

SEARCH WARRANT. See *Warrant. Justices of the Peace.*
when Justice may issue, 136, 179.
if illegal in form, Justice liable to action of trespass, 180.
modern enactments respecting, *ib.*
may now be issued on oath of credible witness, and proof of reasonable cause to suspect, *ib.*
how to proceed under, *ib.*
should in general only authorize search in day time, *ib.*
caution to be observed before issuing it, 180, 1.

SECONDARY.
of Superior Courts, service of articled clerk to, sufficient, 7.

SECURITIES for client. See *Attorney and Solicitor.*
attorney's, &c. duty to obtain, 25.
when arrangement beneficial to client, he should instantly obtain written agreement, *ib.*
lest party fly from engagement, *ib.*

SECURITY.
when legal one may be demanded in lieu of defective one, 55.
essential to know if sufficient, *ib.*
and properly stamped, *ib.*
when bill necessary to enforce delivery of, *ib.*
remedy at law for not giving, *ib.*
of demand of, before proceeding, *ib.*
of requiring security, and defendant's offer of same, 59.
attorney bound to communicate offer to his client, *ib.*

SERVICE of Articled Clerk. See *Attorney and Solicitor. Clerkship, Articles of. Articled Clerks.*
affidavit of regular service necessary, 5, 6, 7, 10.
must be a service altogether of five years, 7.
but need not absolutely be *continuous*, *ib.*
must be to a *bona fide* practising attorney, &c. *ib.*
and practising on his own account, *ib.*
and not serving as clerk or writer to another attorney, *ib.*
neglect of master to take out certificate will not invalidate service of clerk, *ib.*
may be to a prothonotary or secondary of Superior Courts, *ib.*
or to the Master of the Crown Office, *ib.*
exceptions as to *time* of service, 8.
as where proposed clerk has taken the degree of Bachelor of Arts or Law, then service of three years will suffice, *ib.*
enactments of 1 & 2 G. 4, c. 48. s. 2, *ib.*
what service and affidavit of service essential, 10 to 12.

SIX YEARS.
advantages of a clerk being articled for, 5, 7, 14, 15.

SMALL STEALINGS. See *Justices of the Peace.*
proceedings for under 7 & 8 G. 4. c. 29, 135.
provisions of act, 135, 6, 7.

SOLICITOR AND ATTORNEY. See *Attorney and Solicitor.*

SPECIAL PLEADER. See *Students for the Bar*, 37.
his antecedent education and studies, 37 to 42.
his functions considered, 42.

STAMP.
on articles of clerkship, 4.
on admission to practise as an attorney, &c. 5.
when necessary on fresh articles, 7.
when commissioners will return same, *ib.*
on certificate of attorney, 5.
of proctor, 34.
of conveyancer, 34, 5.
of notary, 36.
of special pleader.
on indentures of apprenticeship to serve as a notary, 36.

STATUTE OF LIMITATIONS.
engagement by attorney to make satisfaction upon *discovery* of defect of title, to avoid effect of, 20.

STIPULATIONS.
by attorney for remuneration out of usual course, illegal, 26, 28.
may stipulate for advance where result doubtful, 26.
or require guarantee of third person, *ib.*
which should be in writing, expressing consideration, 27.
to abide the event, improper, *ib.*
or to receive part of estate recovered, *ib.*
or a named sum in case he should recover, 28.
court of equity will in general set these aside, *ib.*

STUDENTS FOR THE BAR.
in general, 37.
no precise course of study or examination prescribed, *ib.*
beyond what *might* be enjoined by the benchers of each inn, 37.
of which he must become a member, *ib.*
term requisite to be a member before he can practise, 38.
exception in favor of Bachelor of Laws or Master of Arts, *ib.*
of keeping terms, *ib.*
when must deposit 100*l.*, *ib.*
formerly public lectures given, 39.
but latterly discontinued, *ib.*
in the Inner Temple, examination takes place before admitted even as a student, *ib.*
propriety of such regulation, *ib.*
must obtain a certificate of approbation before he can be called to the bar, *ib.*
legal qualification rarely attended to by the benchers, *ib.*
what misconduct or moral delinquency would exclude, *ib.*
may appeal to the twelve judges when admission refused, *ib.*
such appeal rarely successful, 39, 40.
revival of public lectures recommended, 40.
but substantial knowledge best attained by private study, *ib.*
causes of failure at the bar considered, 41.
course of study recommended, 41, 2.
other attainments beyond the law requisite, 41, 2.

SUBMISSION to Arbitration. See *Arbitration, reference to.*
care required in framing terms of, 85.
should stipulate to be made a rule of Court, 86.
should be in writing, *ib.*
or not within the act, *ib.*
or may be revoked, 87.
when by agent or trustee, *ib.*
by executors, administrators, &c. 88.
should limit power of arbitrator, 87.
when may be amended, 89.
of making submission rule of Court, 92.
may be made before or after award, *ib.*
in vacation as well as in term, *ib.*
advisable to be made a rule of Court immediately, *ib.*

SUMMONS.
form of oath to obtain one, 173.
when it should issue before warrant, 174.
should be signed by Justice himself, 175.
what it should contain, *ib.*
how be directed, *ib.*
when it would be void, 176.
when appearance cures defect of, *ib.*
form of summons, 177.
what service necessary, 177, 8.
form of summons to a witness under Game Act, 182.
penalty 5*l.* for refusing to attend, *ib.*
in case of non-attendance, how Justice to proceed, 184.
on proof of due service may proceed *ex parte*, *ib.*
if doubtful, should issue fresh summons, *ib.*

SURETY.
consent of, should be obtained before giving time to principal, 59.

SURPLUSAGE.
in information, when it will not prejudice, 158.
in convictions, the same rule, 210.

TENANT, 241 to 251. See *Landlord and Tenant. Justices of the Peace.*

TENDER.
on a bill of costs, when it should be made, 31.

TENDER OF AMENDS.
party proceeded against for any thing done in execution of 7 & 8 G. 4. c. 29 & 30, may tender amends, 139, 141.

TIME. See *Enlargement of Time.*

TIME, Proposal for.
attorney bound to communicate proposal for to his client, 59.
when given to principal, consent of surety should be obtained, *ib.*
or in security of third person, the consideration should be expressed, *ib.*

TITLE, DEFECT OF.
engagement by attorney to make satisfaction on *discovery* of, 20.
this to avoid effect of statutes of limitations, *ib.*

TREES.
penalty for stealing of, 136.

UMPIRE.
appointment of, in reference, 93.
should be appointed before disagreement, *ib.*
may make award after refusal of arbitrator to proceed, *ib.*
but in general not before, *ib.*
how he should be appointed, *ib.*
form of appointment of one, *ib.*

UNQUALIFIED PERSON. See *Attorney and Solicitor.*
cannot sue for business done as an attorney, &c., 15.
prohibited from using proctor's name, 34.

USEFUL SCIENCES.
advantages of studying before being articled to an attorney, &c., 13.

USURY ACTS.
provisions of with regard to solicitors, &c. procuring loan of money, 32.
penalties under the same, *ib.*
provisions of sometimes evaded, *ib.*
when security invalidated, *ib.*

WANT OF FORM.
conviction when not to be quashed, 139, 142.

WARRANT OF JUSTICES. See *Justices of the Peace. Search Warrant.*
demand of perusal and copy of, 61.
when should be made, 61, 2.
when officer protected by, 61.
magistrate, when liable, *ib.* 228 to 231.
when not, *ib.*
form of demand of copy of, 62.

WARRANT OF JUSTICES—(*continued.*)
not necessary when party has not acted strictly in obedience to, 62.
to apprehend, 178.
enactments as to transient offenders, *ib.*
when may be issued in first instance, *ib.*
must be on oath of credible witness, *ib.*
advisable to issue summons in first instance, *ib.*
unless offender likely to abscond, *ib.*
form of warrant, 179.

WARRANT OF ATTORNEY.
executed in presence of uncertificated attorney, when insufficient, 16.

WITNESSES.
bill to perpetuate testimony of, 49, 54.
before arbitrator, how to enforce attendance, 98, 99.
tender of expense must be made, 95, 98.
form of affidavit to obtain order or rule, 99 n. (*x*).
judge's order thereon, *ib.*
arbitrator's swearing witnesses, 100.
examination of before arbitrator, 101.
oaths of, *ib.*
mode of taking their evidence before arbitrator, 102.
falsely swearing before arbitrator may be indicted for perjury, 98.
before justices, securing evidence and attendance, 181.
form of summons to witness, 182.
evidence, 188.
oath of witnesses, *ib.*
mode of examination, 189.
mode of taking down evidence, *ib.*
recital of evidence in conviction, 199.
mode of stating in conviction, 200.
statement of evidence for defendant, 201.
what evidence on face of conviction will sustain it, 202.
on appeal,
fresh evidence may be given, 218.
on proceedings for a forcible entry or detainer, 241.
party interested not a witness, *ib.*

WRITER OR CLERK. See *Attorney and Solicitor.*
service of articled clerk to attorney, &c., serving as writer, &c. to another attorney insufficient, 7.

WRITTEN RETAINER. See *Retainer. Attorney and Solicitor.*
propriety of giving one considered, 18.
though not absolutely requisite, 19.

WRONGFUL POSSESSION. See *Justices of the Peace. Forcible Entry and Detainer.*
summary proceedings before justices in cases of, 231 to 241.